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MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

SEPTEMBER 26 TO DECEMBER 21, 1916

JAMES M. REASONER

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JUN 2 1918

SUPREME COURT.

CHIEF JUSTICE.

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JOHN W. STONE, MARQUETTE, . . .	Dec. 31, 1917

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JOHN E. BIRD, ADRIAN, . . .	Dec. 31, 1919
JOSEPH B. MOORE, LAPEER, . . .	Dec. 31, 1921
JOSEPH H. STEERE, SAULT STE. MARIE, . . .	Dec. 31, 1921
FLAVIUS L. BROOKE, DETROIT, . . .	Dec. 31, 1923
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ATTORNEY GENERAL—GRANT FELLOWS, HUDSON.

The residences of the judges, given above, are as of the date of their election.

¹Appointed July 16, 1915, to fill vacancy.

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MUNICIPAL JUDGES.

RECORDER'S COURT OF DETROIT.

WILLIAM F. CONNOLLY, EDWARD J. JEFFRIES.

SUPERIOR COURT OF GRAND RAPIDS, MAJOR L. DUNHAM.

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JUNE TERM 1916.*

JONES v. CITY OF BATTLE CREEK.

MUNICIPAL CORPORATIONS—CITIES—PUBLIC OFFICER.

Where, previous to the adoption of a charter under the new Constitution, a stockkeeper was appointed by the mayor of a city and held office at a weekly salary, and later a new charter was adopted providing that all appointive officers having indefinite tenure should continue in office under the charter until successors were appointed, and where the official took an oath of office and his duties consisted in having charge of the brickyard where tools and implements were located and a key of the brickyard and building therein, he was an employee and did not belong to the class of appointive officers.

Error to Calhoun; Weimer, J., presiding. Submitted June 20, 1916. (Docket No. 92.) Decided September 26, 1916.

Assumpsit by M. J. Jones against the city of Battle Creek for salary as city stockkeeper. Judgment for plaintiff on a directed verdict. Defendant brings error. Reversed, and no new trial ordered.

Howard W. Cavanagh (*Stevenson, Carpenter, Butzel & Backus*, of counsel), for appellant.

N. A. Cobb. for appellee.

On June 19, 1911, the common council of the defendant city passed the following resolution:

“Resolved by the common council of Battle Creek that, in accordance with the recommendation of the mayor, a stockkeeper be appointed to look after the properties at the city shed at a salary of \$12 a week.”

*Continued from Vol. 192.

On the same date the mayor appointed the plaintiff, M. J. Jones, stockkeeper, and asked the council to confirm the appointment, which was done.

On April 15, 1912, the mayor appointed certain officers and employees to various positions for the ensuing year, and among them the plaintiff. This appointment by its terms expired on April 15, 1913.

On April 10, 1913, a new charter was adopted by the city of Battle Creek, which went into effect on that date, chapter 9, § 1, of which provides in part:

“And provided, that all appointive officers heretofore appointed by the mayor and common council, the board of public works or police commission, whose appointment was made for a definite or indefinite term of office, and whose term of office shall not have expired when this charter shall go into effect, they and each of them may and shall continue in office under this charter until their successors are appointed by the commission, at which time their term of office shall expire.”

On the 20th day of April, 1912, plaintiff took an oath of office to the effect that he would support the Constitution of the United States and the State of Michigan, and faithfully discharge the duties of the office of stockkeeper for the city of Battle Creek to the best of his ability.

After the expiration of the year for which plaintiff was appointed he continued to perform the duties of his position until April 21st, upon which date one Shoupe was appointed street commissioner, and at the same time was appointed stockkeeper to act without pay, and his appointment was confirmed by the unanimous vote of the common council.

On the morning of April 22, 1913, plaintiff reported for duty, and found Mr. Shoupe in possession of the office, with the doors unlocked and the desk open. He remarked to Mr. Shoupe, “I guess you got my job,”

left his key on the desk, and departed. From that day until the decision in the case of *North v. City of Battle Creek*, 185 Mich. 592 (152 N. W. 194), plaintiff made no demand upon the defendant city for wages, nor did he at any time tender his services to the defendant city.

It is the claim of defendant that plaintiff was not an appointive officer within the meaning of the new charter relied upon, which was successfully invoked in *North v. City of Battle Creek*, *supra*. The defendant asserts that plaintiff was a mere employee. It is further claimed in behalf of defendant that, even if it be held that plaintiff was an officer, within the meaning of the charter provision, he, by his conduct at the time his successor was appointed and assumed the duties of the office, has estopped himself from now claiming pay for work which he neither performed nor offered to perform, and in this behalf it is the further claim of defendant that his conduct amounted to an abandonment of his office.

In the court below a verdict was directed in favor of the plaintiff for the amount of his wages from the date of the appointment of Shoupe to the date of the rendition of the opinion in the *North Case* some two years later; the latter date being adopted by the court with consent of plaintiff's counsel.

BROOKE, J. (*after stating the facts*). The record fails to disclose that under either the new or the old charter of the city of Battle Creek is there any office provided for under the name of "stockkeeper." It will be noticed, too, that the resolution providing for the plaintiff's appointment recites simply that:

"A stockkeeper be appointed to look after the properties at the city shed at a salary of \$12.00 a week."

It seems to us that the contention that one, even though appointed by the mayor and common council,

who performs duties such as were performed by the plaintiff in this case, is a public officer, is wholly untenable.

The mayor, defining the duties of plaintiff, in his testimony, said:

"He had some sort of charge of the city yard where the tools, the road scrapers, plows and tools, brick, and all material are located and fenced in and big gates where the teams drove in. I also found that he had a key to that yard and the little building. There was a little building there in which some of the stuff was kept under cover, and that he let the city employees in with material and out taking material and tools out and that he kept the globes for the street lights in that building and that they were delivered to him by the man who took care of the lights."

We have lately (*Blynn v. City of Pontiac*, 185 Mich. 35 [151 N. W. 681]) had occasion to inquire with care into the distinction between a public officer and an employee, and the various authorities bearing upon the question will be found there collected. For the purpose of determining the issue in this case it is unnecessary to go further than to cite the case of *Throop v. Langdon*, 40 Mich. 673. There Justice COOLEY said:

"In this case the facts are stipulated, and are given in the margin. We find among them no evidence that an office known as chief clerk in the office of the assessor of Detroit has ever been created. A person has been appointed and has acted under the designation of chief clerk, but no statute or ordinance has given him that title, and if he were now to be called and to style himself in the discharge of his duties head clerk, or leading clerk, or assistant to the assessor, or assessor's amanuensis, it would, for aught we can discover, be equally well; for nothing whatever depends upon the name. Indeed, we can discover no necessity for his making use of the title at all, except perhaps to indicate to those with whom he was transacting business that he was not an intruder in the assessor's office. Nor do we find in the facts stipulated or in any law

or ordinance the requirement of an official oath. It is said that the usual oath of office has sometimes and perhaps always been administered, but why administered we do not understand. The fact of its being taken cannot prove that the clerk is an officer; at most, it could only evidence his belief that he was one, or perhaps his caution to observe all forms that possibly might turn out to be essential. It was, we think, a needless ceremony.

"Nor do the duties usually performed by the chief clerk indicate an office rather than an employment. Nothing but custom has defined them, and custom has certainly not been very specific, except in excluding him from all 'the official functions, power, and authority appertaining to the office of assessor,' and from 'representing the assessor in any official act or duty.'"

* * * Nor is there anything significant in the fact that the chief clerk is independent of the assessor in the tenure of his position. The common council might give the assessor a janitor equally independent in that particular, but the janitor would not be an officer."

See, also, *U. S. v. Maurice*, 26 Fed. Cas. p. 1211, where Chief Justice MARSHALL said:

"Although an office is 'an employment,' it does not follow that every employment is an office. A man may certainly be employed under a contract, express or implied, to do an act, or perform a service, without becoming an officer."

And see *City of Ellsworth v. Rossiter*, 46 Kan. 237 (26 Pac. 674).

Judgment is reversed, and there will be no new trial.

STONE, C. J., and KUHN, OSTRANDER, BIRD, MOORE, STEERE, and PERSON, JJ., concurred.

THOMPSON v. ADDISON FLOURING MILL CO.**1. WATERS AND WATERCOURSES—WATER RIGHTS—PARTIES.**

In a chancery proceeding to compel a mill company to maintain a low water level, where other proprietors of riparian rights interested in the water level being maintained at a lower point were not parties, the court could not by its decree foreclose their rights.

2. SAME.

Held, on review of all the evidence in said cause, that a decree which established defendant's prescriptive right to raise the waters of the lake above a fixed point on the sill of the flume was not justified, and complainants' bill should be dismissed.

Appeal from Lenawee; O'Mealey, J. Submitted June 22, 1916. (Docket No. 94.) Decided September 26, 1916.

Bill by Gamaliel I. Thompson and others against the Addison Flouring Mill Company to restrain the lowering of the waters in Devils Lake. From a decree for defendant, complainants appeal. Decree entered dismissing the bill.

John A. Riley and Fellows & Chandler, for complainants.

Baldwin, Alexander & Russell, for defendant.

Plaintiffs in this action are all owners of property bordering Devils Lake, which is a small inland lake in Lenawee county. These plaintiffs have erected cottages upon their property which they occupy during the summer months, and many own launches and smaller boats, and have built docks and boathouses for their convenience.

Defendant, the Addison Flouring Mill Company, owns and operates a mill in the village of Addison. This mill is situated on the bank of Bean creek, or Tiffin river, which is the outlet of Devils Lake. A flume was put in at the natural outlet of Devils Lake about 1848. It is 4 feet wide, and the gate is about 40 inches high. Since 1848 the defendant company has used this flume by right of prescription and through grant. Defendant acquired this mill property from Azariel Smith and wife in 1906, together with rights in a certain contract which said Smith had made with the village of Addison to furnish power for an electric light plant in the village.

It is claimed by plaintiffs that said Smith dredged out and lowered Bean creek, or Tiffin river, from the outlet at Devils Lake to a depth of 3 feet for the purpose of securing power for the lighting plant in Addison, thereby allowing a greater quantity of water to pass through the outlet. Plaintiffs further claim that previous to the summer of 1910 the gates at the head of the flume were never raised sufficiently to permit the water of Devils Lake to run out to a much lower level than they would by nature, but that in 1910 the gates were raised, and the water was allowed to run through the channel to such an extent that the lake in front of the cottages of the plaintiffs was lowered about a foot and a half, so that they could not use their launches, making their docks and boathouses useless, and leaving great stretches of dry lake bottom in front of their cottages. Plaintiffs further claim that defendant has acquired the right by prescription to flood plaintiffs' land to an artificial highwater mark, claimed to be 40 to 42 inches above the bottom of the flume in the ordinary year, and to withdraw water to an artificial ordinary low-water point about 20 inches above the bottom of the flume, which plaintiffs claim defendant had previously maintained.

Defendant denies that the bed of Bean creek was ever dug lower than the bottom of the flume, stating that it was its custom to clean out the muck and weeds from the channel between the flume and the lake every few years, but that it had never believed it had a right to lower this channel, and had never attempted to do so.

Defendant denies that an artificial low-water mark was ever established or maintained, claiming that it has always lowered and raised the flume gate to suit its requirements as regards water supply at the mill, and that practically every year in the late summer and fall the gate has been raised entirely above the water, allowing the water to pass freely through the flume, thus taking its natural course; and defendant further claims that it has not used any more water since furnishing power for the electric plant than previously, as it has always used all the water it could possibly get during the dry seasons for over 40 years, and if it could have got any more it would not have installed an auxiliary steam plant at its mill. Defendant produced evidence tending to show that the summer of 1910 was an exceptionally dry one, and that the lake became low, not by reason of anything done by defendant, but by reason of evaporation, slight rainfall, etc. Defendant claims that it has no intention of varying or changing the riparian rights of the plaintiffs, but simply intends to use and exercise the rights of the flume as it has in the past, taking the seasons into consideration, and that it is entitled to do so by prescription and by deed.

It was held in the court below that the allegations in the plaintiffs' bill of complaint were not sustained by proof and the bill was dismissed.

BROOKE, J. (*after stating the facts*). A careful perusal of the very voluminous record in this cause con-

vinces us that the following facts are established by an overwhelming preponderance of the proofs:

(1) The defendant has not lowered the channel through which the water of Devils Lake entered the flume maintained by defendant in such manner as to cause the waters of the lake to flow therefrom to a greater degree than they would have flowed in a state of nature.

(2) The sill of the flume through which the excess waters of Devils Lake must flow has been maintained at its present level for upwards of 40 years.

(3) Defendant has acquired by prescription the right to impound the waters of Devils Lake by the insertion of flashboards or a gate in said flume.

(4) For a period of upwards of 40 years defendant and its predecessors in title have claimed and exercised the right to draw the impounded waters from said lake as they were required for the purpose of producing power.

(5) In seasons of low water this right has been consistently exercised to the extent that defendant and its predecessors in title would remove all the flashboards or lift the gate so that the water flowed without restraint over the sill.

(6) In one, possibly two, exceptionally arid seasons, either by reason of diminished precipitation or excessive evaporation, the level of the lake has been lowered to a point where no water flowed over the sill of the flume. To afford power during periods of extraordinary low water, defendant's predecessors in title installed an auxiliary steam plant which has been operated as occasion required for many years.

(7) Lower riparian owners have acquired a prescriptive right to the continued use and flowage of the waters of Devils Lake unimpeded by a permanent barrier above the sill of the flume.

(8) During the year 1910 and the first half of 1911 the amount of precipitation was 17 inches below normal. Plaintiffs complained of the low state of the water during this period. The condition should be ascribed rather to decreased rainfall than to excessive use of the water by defendant, who in those years manipulated the gate in the flume in the same manner as it had been manipulated through a long series of years.

(9) The claim of plaintiffs that an artificial low level at a point between 17 and 23 inches above the sill of the flume has been maintained by the defendant and its predecessors in title, and that plaintiffs have acquired a prescriptive right to have the water maintained at such level, is not sustained by the proofs in the case.

The record discloses that, while the plaintiffs are interested in maintaining a high level of the waters of Devils Lake, farmers in its vicinity are equally interested each season in an early lowering of said level in order that the lands affected may be rendered fit for husbandry. Parties so interested in the lowering of the waters of the lake, and from a perusal of the record there appear to be many of them, are not parties to this record, and their rights, whatever they may be, should not be concluded by any decree herein. Inasmuch, therefore, as plaintiffs' contention involves only the right of defendant to lower the lake to the point of taking all the water therein that will flow over the sill of the flume, and as plaintiffs' proofs failed to show them to be entitled to the relief prayed, we agree with the decree of the court below in dismissing the bill of complaint. We disagree with that portion of the decree which establishes in defendant a prescriptive right to raise the waters of the lake to a certain fixed point above the sill of the flume. We reach this conclusion not because defendant may not be entitled

to such a prescriptive right, but because the question whether it was so entitled was not properly an issue in the case, and the rights of the interested persons not parties to the record should not be foreclosed by such a decree.

In this court a decree will be entered simply dismissing plaintiffs' bill, with costs.

STONE, C. J., and KUHN, OSTRANDER, MOORE, STEERE, and PERSON, JJ., concurred. BIRD, J., did not sit.

W. C. STERLING & SON CO. v. WATSON & BENNETT CO.

CONTRACTS—EVIDENCE—ACCEPTANCE.

The question being whether or not a contract exists and the evidence conflicting, a question for the jury is presented: and plaintiff, who forwarded to defendant a contract calling for a quantity of poles, which defendant signed, but added after the quantity indicated the words "more or less," which contract plaintiff later signed, striking out the word "less," did not thereby accept the proposal or do more than make a series of offers.

Error to Chippewa; O'Brien, J., presiding. Submitted June 26, 1916. (Docket No. 133.) Decided September 26, 1916.

Assumpsit by W. C. Sterling & Son Company against Watson & Bennett Company for money had and received. Judgment for plaintiff on a directed verdict. Defendant brings error. Affirmed.

Davidson & Hudson, for appellant.

Warner & Sullivan, for appellee.

W. C. Sterling & Son Company, plaintiff, does business at Monroe, Mich. Watson & Bennett Company, the defendant, does business at De Tour, Mich. Both companies are in the lumber business.

In 1914 Mr. Sayers, an agent of plaintiff, had a conversation with Mr. Watson, representing the defendant, regarding a proposed contract with defendant, and later Mr. Johnson, also an agent of plaintiff, sent Mr. Sayers a draft of a contract to be signed by defendant which called for 20 M. cedar ties or more and 4 M. or more poles. Mr. Watson, acting for defendant, changed this to 1 M. poles, signed it, and returned it. Mr. Sayers then sent back another contract calling for 20 M. ties and 4 M. poles, which contract, in the presence of Mr. Sayers, Mr. Watson changed to read: "4 M. poles, more or less." This contract Mr. Sayers agreed to submit to his company for signature. Later Mr. Watson saw this contract after he had signed it, but the word "less" had been stricken out and the word "more" left in. It was, however, never delivered to Mr. Watson in its corrected form, and he never did, and, according to his testimony, never would have agreed to it with the word "less" stricken out. While the parties were thus seeking to agree upon the details of the contract, plaintiffs advanced the defendants the sum of \$6,000, and defendants delivered to plaintiffs a cargo of forest products worth \$455.51 less than the amount advanced. Plaintiffs are now seeking to recover the sum advanced by them in excess of the value of the cargo which they received.

It is the contention of plaintiff that, as the contract was sent back and forth between the parties with changes made every time which were not assented to, the whole transaction amounts to no more than a series

of offers, none of which were accepted in terms, and that no contract was, in fact, ever entered into between the parties, although both parties acted under the assumption that a valid contract subsisted; the plaintiff believing that it was entitled to receive 4 M. or more poles, whereas the defendant believed that it was to furnish 4 M. more or less.

Defendant set up a claim for recoupment upon the theory that there was a subsisting contract, and that plaintiff had breached it by refusal to receive the balance of the timber provided for in the various drafts thereof, and that the defendant had been consequently injured in an amount upwards of \$3,000.

The trial court directed a verdict for the plaintiff for the sum of \$455.51, and interest, and held that defendant's claim for recoupment was abortive, for the reason that there was no evidence tending to show that a valid contract had been entered into between the parties.

BROOKE, J. (*after stating the facts*). Defendant has brought the case to this court by writ of error, claiming that the court erred in failing to submit the same to the jury for the determination of the following questions:

- (a) Was a contract made?
- (b) If so, what was the contract?
- (c) Was the contract broken by plaintiff?
- (d) If so, what damage did defendant suffer as a result of such breach?

While it is admitted that a meeting of minds upon all essential points is necessary to constitute a valid contract, and, further, that it is the province of the court to construe a document and determine whether or not a valid contract exists, it is still contended by appellant that, where the question is whether or not a contract exists, and where the evidence is conflicting,

it is a question for the determination of the jury, and not of the court. Many authorities are cited supporting this proposition, and there can be no doubt of its soundness. The question still remains, however, whether the court erred in determining that under the undisputed testimony no valid contract was shown.

The evidence of Thomas H. Watson, the president of the defendant company, it seems to us, should set at rest the claim of defendant that a valid contract subsisted between the parties. We quote a portion of his testimony upon cross-examination as follows:

"Q. After you made your first communications with Mr. Sayers, the written contract was submitted to you for your signature, wasn't it?

"A. Yes, sir.

"Q. That written contract calls for 20,000 ties and 4,000 poles?

"A. Yes, sir.

"Q. That was the first one?

"A. That is the first one.

"Q. You didn't want to agree to sell 4,000 poles; so you changed the 4,000 to 1,000?

"A. Yes, sir.

"Q. And returned the contract with that change in it to whom?

"A. To Mr. Sayers.

"Q. Then that came back to you afterwards with the 1,000 changed back to 4,000?

"A. No, sir; it didn't come back. It was a new one came back.

"Q. Well, that one never came back, then?

"A. No.

"Q. So that was not a contract; that is, the first contract that you had changed never came back to you afterward?

"A. No; it was supposed to be canceled.

"Q. It was supposed to be canceled? Well, I guess that is right. I guess it was canceled by the subsequent proceedings, anyway. So another contract came back to you with 20,000 ties and 4,000 poles again?

"A. Yes, sir.

"Q. Now, that was the contract about which you and Mr. Sayers had the conversation which you detail in which you told him you didn't have 4,000 poles and couldn't agree to deliver 4,000 poles?

"A. I told Mr. Sayers it was getting late in the season, and I might not be able to get 4,000 poles.

"Q. And then you and Mr. Sayers, in the presence of the bookkeeper, changed the contract again?

"A. At least the bookkeeper did, in the presence of Mr. Sayers and myself.

"Q. At any rate, it was changed and at your suggestion?

"A. At Mr. Sayers' suggestion.

"Q. Well, it was upon your refusal to enter into a contract for 4,000 poles?

"A. Yes, sir.

"Q. So the contract was then changed to read '4,000 more or less'?

"A. Yes, sir.

"Q. And Mr. Sayers took both copies?

"A. Yes, sir.

"Q. You had signed both copies?

"A. Yes, sir.

"Q. And he at last said that he would send them in to the company for approval?

"A. Yes, sir.

"Q. They didn't bear the company's signature at that time?

"A. No, sir.

"Q. Well, now, did you afterwards see those same contracts again?

"A. Yes, sir.

"Q. And they had been changed again?

"A. Yes, sir.

"Q. And 'more or less' been stricken out and just 'more' left in?

"A. 'More' left in.

"Q. But this last contract was not delivered to you, as I understood, that is, the one where 'less' had been stricken out?

"A. No.

"Q. That change had been made after you had signed it?

"A. Yes, sir.

"Q. And without your consent?

"A. Yes, sir.

"Q. You never consented to that change?

"A. Not that I know of.

"Q. You didn't intend to consent to it, anyway, and you haven't consented to it yet?

"A. I think not.

"Q. Well, you haven't done it knowingly, anyway?

"A. No, sir.

"Q. And you say that you never received any contract signed by the Sterling & Son Company, and by yourself, in which you agreed to furnish 4,000 or more poles?

"A. No.

"Q. You would not agree to that?

"A. No, sir.

"Q. And if you had received a contract which had been changed after you signed it in that way, you would not have accepted it?

"A. No, sir."

This testimony was uncontradicted, and, based upon it, the court's determination as to the matter of defendant's set-off and recoupment was correct.

"A court cannot * * * submit to a jury facts on which the testimony is all one way." *McGrath v. Railroad*, 57 Mich. 555 (24 N. W. 854); *Hunt v. Order of Chosen Friends*, 64 Mich. 671 (31 N. W. 576, 8 Am. St. Rep. 855).

The case of *Johnson v. Surety Co.*, 187 Mich. 454 (153 N. W. 788), is easily distinguishable from the case at bar. There we held there was a "grumbling assent" to the first offer of contribution, and that all requests to modify or change the offer did not have the effect of rejecting the offer. There is no claim in the case at bar that there was a subsequent acceptance. Defendant's president, Mr. Watson, states that he never agreed to sell 4 M. poles, that he never would agree to sell 4 M., and that, if he had received a contract calling for 4 M., he would not have accepted it.

It is clear that plaintiff believed the defendant intended to sell it 4M. poles, and sent a contract calling for 4 M., at the same time having advanced \$4,000 in money upon the basis of a contract for 4 M. poles, and that under such circumstances it would not accept a contract for 1 M. poles.

We agree with the contention of the plaintiff that the conduct of the parties in the premises amounted to no more than a series of offers, no one of which was assented to in its essential terms by the other party.

There appears to have been no dispute between the parties as to the amount of money advanced by the plaintiff and the value of the timber furnished by defendant to plaintiff, and that, so far as performed, the dealings between the parties left a balance due the plaintiff from defendant in the amount represented in the instructed verdict.

The judgment is affirmed.

STONE, C. J., and KUHN, OSTRANDER, BIRD, MOORE, STEERE, and PERSON, JJ., concurred.

PEOPLE v. LAY.

1. CRIMINAL LAW — GRAND JUROR — PROSECUTOR — OBJECTIONS — STATUTE.

No objection can be made to a grand jury, or to any member thereof, except for reasons specified in the statute.
3 Comp. Laws, § 11881, 3 Comp. Laws 1915, § 15708.

2. SAME—ACCUSATION.

A prosecutor is one who prefers an accusation against a party whom he suspects to be guilty.

193 Mich.—2.

3. SAME.

Where a plea to an indictment in a criminal case charged that one of the grand jurors was disqualified from sitting on the jury because he had been a Federal official in a prosecution in which respondent was indicted, and which involved the same state of facts, and that he acted as a stenographer in taking testimony before the referee in bankruptcy in a related cause, and that the testimony so taken was read from the juror's minutes before the grand jury which returned the indictment, the averment was duplicitous in so far as the pleader may have intended to charge that the indictment was founded upon incompetent testimony, and the mere fact that incompetent testimony was received and considered was not fatal, unless it was the only testimony considered: the juror was not a prosecutor in the sense which would disqualify him to sit.

4. SAME—INDICTMENT—QUASHING INDICTMENT.

A matter urged as an objection to the validity of the action of such grand jury in returning an indictment, aside from the provisions relating to the competency of grand jurors, cannot be considered on a motion to quash.

5. SAME—EVIDENCE—EMBEZZLEMENT.

Upon reviewing the testimony claimed by respondent to have been insufficient, the verdict of the jury, in a prosecution for embezzlement from a private corporation of which respondent was vice president and a director, is *held* to have been justified by evidence tending to show an offense, though denied by the accused.

6. SAME—EVIDENCE—CONSTITUTIONAL PRIVILEGE—GRAND JURY—WITNESSES.

That the respondent was summoned by the grand jury to give testimony before it, appeared and testified, and, lacking advice of counsel, did not know what questions he was privileged to refuse to answer, was not a ground to quash the indictment; the evidence was given by him without objection, and hence might properly be considered by the jury.

7. SAME—BANKRUPTCY ACT—PRIVILEGE.

But no testimony given in bankruptcy proceedings by the respondent should have been received in the trial of the prosecution against him, officers of a bankrupt corporation

being within the privilege of 30 U. S. Stat. 548, U. S. Comp. Stat. 1913, § 9591.

8. SAME—ARGUMENT—CONDUCT OF TRIAL.

Improper argument of counsel for the prosecution that the respondent and other witnesses had failed to testify, was a proper subject of criticism, and constituted reversible error. See 3 Comp. Laws, § 10211, 3 Comp. Laws 1915, § 12552.

Exceptions before sentence from Kalamazoo; Weimer, J. Submitted April 14, 1916. (Docket No. 129.) Decided September 26, 1916.

Frank B. Lay, Jr., was convicted of embezzlement. Reversed.

Grant Fellows, Attorney General, and *Frank F. Ford*, Prosecuting Attorney (*Charles W. Nichols*, of counsel), for the people.

E. M. Irish and *Charles H. Farrell* (*Allan H. Frazer*, of counsel), for respondent.

Respondent in this case was indicted by a grand jury, and in said indictment was charged, together with one Victor L. Palmer and George T. Lay, with having embezzled from the Michigan Buggy Company, a corporation of which respondent was vice president and a director, the sum of \$42,446.52. To the information respondent interposed several pleas in abatement, the substance of which was as follows:

(1) That Joseph W. Stockwell, one of the grand jurors of the jury which found the indictment, was disqualified from acting for the reason that said Stockwell was the United States commissioner for the western district of Michigan before and at the time he was drawn on said grand jury, acting as such in the western district of Michigan during all of the time he sat on said grand jury, and that before said grand jury

was impaneled, said Stockwell had before him as such commissioner the minutes of the testimony upon which respondent was indicted, given by respondent in the bankruptcy proceeding, with a view of issuing a warrant against this respondent under the statutes of the United States of America, and from his investigations, which included a consultation with the United States district attorney, said Stockwell became a part of the prosecuting force of the government of the United States of America, to prosecute this respondent upon the same state of facts upon which he was afterwards indicted by said grand jury, and that said Stockwell had power in his discretion to have started a criminal proceeding upon said state of facts against respondent, and that said Stockwell was one of the prosecutors against him on said state of facts before he was drawn on said grand jury, and was disqualified from acting as a grand juror for that reason.

It is further alleged that said Stockwell acted as a stenographer in the taking of testimony before the referee in bankruptcy in the matter of the Michigan Buggy Company, a bankrupt; that in said proceeding said Stockwell took the testimony of the respondent, and that the minutes of said testimony were used in said contemplated proceeding before said United States commissioner.

It is further alleged that the testimony so taken by Stockwell in the bankruptcy proceeding was by him read before the grand jury as evidence against respondent.

(2) That the books and writings of the Michigan Buggy Company and the testimony of the bookkeepers and clerks having the same in charge were used to secure the indictment of the respondent, and that such use was illegal under the Federal Bankruptcy Act (Act July 1, 1898, chap. 541, 30 U. S. Stat. 544).

(3, 4, 5) These pleas set up that various members

of the grand jury were disqualified to act as said jurors, for the reason that they were stockholders in various banks, which banks were creditors of the bankrupt Michigan Buggy Company.

(6) It is charged that the respondent was summoned by the grand jury to give testimony before it, and that he appeared in obedience to said summons and gave such testimony; that, being without the advice of counsel, he did not know what questions he was privileged to refuse to answer, and he avers that, without his testimony so obtained, no indictment would have been found against him.

(7) It is charged that the name of Stockwell was not among those in the grand jury box, although an attempt had been made by those in charge of the grand jury to have his name placed upon the list by the supervisors. It is further charged that one Pomeroy, a juror, having been excused, Stockwell, who at the time was seated at his desk in the courtroom, acting as official stenographer of the ninth judicial circuit, was called as a talesman, and immediately ceased to perform his duties as such stenographer, and proceeded to act as a member of the said grand jury, participating in all of its deliberations and voting for the indictment of the respondent.

The people filed a demurrer to said several pleas of abatement, contending that the same were insufficient in law to bar the people from prosecuting the said indictment. Respondent thereupon demanded a bill of particulars of the charges upon which the indictment in the cause was based. Such bill was presented by the people, and in it, it was charged that upon 15 separate dates between January 2, 1913, and July 1, 1913, the defendant had embezzled certain sums of money, ranging from \$100 to \$3,900, and amounting in the aggregate to upwards of \$40,000.

A brief history of the facts leading up to the indict-

ment of the respondent, together with his brother George T. Lay and Victor L. Palmer, is as follows: The Michigan Buggy Company was incorporated in 1883, and reincorporated in 1893. In 1909 it had a capital stock of \$300,000, all common stock, and that year \$200,000 of preferred stock was issued, and the company, which theretofore seems to have attained a fair degree of prosperity as a manufacturer of buggies, embarked upon the manufacture of automobiles. This business was continued by the company until its bankruptcy in the summer of 1913. Up to 1912 M. H. Lane, F. B. Lay, Sr., and Victor L. Palmer were the owners of all the common stock of the concern. They constituted the board of directors, and were for many years the officers of the corporation; M. H. Lane being president, Frank B. Lay, Sr., treasurer, and Victor L. Palmer, secretary. Some time in the year 1912 (probably April 20th) 100 shares of the common stock of the company were given to each of the sons of F. B. Lay, Sr., viz., George T. Lay and respondent, Frank B. Lay, Jr. The board of directors was increased from three to five, and George T. and Frank B. Lay, Jr., were made vice presidents. The respondent commenced to work for the company when he was 18 years of age, in 1905, at a salary of \$25 per month. This salary was increased from time to time until during the last year of the existence of the corporation, he drew, according to the books of the company, as assistant sales manager, the sum of \$300 per month. This salary was paid by two separate checks of the company each month of \$150 each. For some reason they were charged to two separate accounts upon the books. Prior to the year 1912 respondent's salary had never exceeded \$1,800 a year. On April 20, 1912, a meeting of the board of directors was held at which all of the directors were present. At this meeting Mr. Lane was deposed as president, and

Frank B. Lay, Sr., was elected in his place. Mr. Lane was made chairman of the board, and Mr. Palmer was elected secretary and treasurer. On February 8, 1912, at a meeting of the board of directors, the salaries of the officers of the company for the year 1912 were fixed as follows:

"Mr. Lane	\$6,000 00
Mr. Lay	6,000 00
Mr. Palmer	6,000 00"

—with further compensation of \$6,000 to Mr. Palmer, to be continued at the discretion of the board. In June, 1912, respondent and his brother having in the meantime been elected directors of the company, a meeting of four of the directors of the board, Mr. Lay, Sr., Mr. Palmer, George T. Lay, and the respondent, was held at the Burdick House in Kalamazoo. The fifth director, Mr. Lane, had no notice of this meeting. It was there talked over and agreed between the four directors attending that Mr. Lay, Sr., should draw a larger amount out of the business than he was then drawing according to the resolution of February 8, 1912, that Mr. Palmer's salary should be \$25,000 per year, and that the salary of George T. Lay and respondent should be \$12,000 per year each. The record does not disclose that any formal action was taken by the four members of the board at this meeting, or that any record thereof was made in the corporate books. Following this meeting, and commencing on July 1, 1912, respondent continued to receive, as before, his salary of \$300 per month in two checks (\$150 each) which were usually drawn and signed by himself, one of which was charged to "office and selling expense," the other to "personal account." In addition to this sum of \$300 respondent received in cash from Palmer each month the sum of \$700, which brought his salary up to \$12,000 per annum, the amount agreed upon at the Burdick House meeting. Commencing January 1,

1913, respondent received cash payments from Mr. Palmer each month in an amount sufficient to make his salary from January 1, to July 1, 1913, \$25,000 per annum. No warrant for the payment of these sums by Palmer to respondent seems to have existed prior to March 29, 1913, upon which date the respondent, his brother, George T. Lay, and Palmer held a so-called meeting of the board of directors. Neither Mr. Lay, Sr., nor Mr. Lane were present. At this meeting the following business was transacted:

"Mr. George T. Lay moved that the following salaries paid to the officials of the company for the year ending January 31st, 1913, be hereby ratified and approved as follows:

M. H. Lane	\$6,000 00
F. B. Lay, Sr., for salary paid and dividends paid upon both common and preferred stock, an amount less than	35,000 00
George T. Lay an amount not exceeding.....	25,000 00
F. B. Lay, Jr., an amount not exceeding.....	25,000 00
V. L. Palmer, an amount not exceeding.....	25,000 00

"Mr. Palmer supported the motion, and it was put to vote and carried.

"Geo. T. Lay moved that the following officials salary list be approved for the year ending January 31; 1914, unless otherwise ordered by this board:

M. H. Lane	\$6,000 00
F. B. Lay, Jr.	25,000 00
V. L. Palmer	25,000 00
George T. Lay	25,000 00

"Mr. Palmer supported the motion, which, being put to vote, was carried.

"Mr. George T. Lay moved that the salary of President Mr. F. B. Lay, Sr., for the year ending January 31, 1914, be fixed at an amount of \$35,000.00, provided, however, that the dividends paid Mr. Lay, Sr., upon both his common and preferred stock be construed as to apply against this authorization of salary so that the combination of salary and common and preferred

dividends do not exceed the amount stated, \$35,000.00. Mr. Palmer supported the motion, and it, being put to vote, was carried.

"Mr. Geo. T. Lay moved that: Whereas, the salary paid the chief engineer, Mr. W. H. Cameron, for the past year was \$10,000.00, and that while this salary was originally agreed upon to continue for a three-year period, for business reasons and commercial circumstances, he moved that for the second year the salary be fixed at \$16,000.00. Mr. Palmer supported the motion, which was put to vote and carried.

"There being no further business, the meeting closed in due form."

In order to possess himself of the necessary cash with which to satisfy the "salaries" thus provided for, Mr. Palmer caused checks to be drawn, payable to cash. These checks were, by Mr. Palmer, cashed and the money distributed to the various officers, including respondent. For each payment of cash received by respondent from Mr. Palmer, respondent gave a receipt, a sample of which is as follows:

"\$1,783.33.

February 1, 1913.

"Received of the Michigan Buggy Company \$1,783.33, balance January salary.

"F. B. LAY, JR."

Most, if not all, of the checks drawn payable to cash and cashed by Palmer were charged upon the books of the company to "J. Roach & Co.," and appeared on said books as an asset of the corporation. It is fairly inferable from the record that the "J. Roach & Co." account was a fictitious account, invented for the purpose of concealing the withdrawal of the funds represented by it.

The jury returned a general verdict of "guilty," and the case is now before us upon exceptions before sentence.

BROOKE, J. (*after stating the facts*). The first mat-

ter requiring consideration is the assignment of error based upon the action of the court in sustaining the demurrer to the several pleas in abatement. The statute involved (section 11881, 3 Comp. Laws [3 Comp. Laws 1915, § 15708]) provides:

"A person held to answer to any criminal charge, may object to the competency of any one summoned to serve as a grand juror, on the ground that he is the prosecutor or complainant upon any charge against such person; and if such objection be established, the person so summoned shall be set aside."

Section 11882 (15709) provides:

"No challenge to the array of grand jurors, or to any person summoned as a grand juror, shall be allowed in any other case than that specified in the preceding section."

This court has frequently held that no objection can be made to a grand jury or to any member thereof except for reasons specified in the statute. *People v. Reigel*, 120 Mich. 79 (78 N. W. 1017); *People v. Salisbury*, 134 Mich. 537 (96 N. W. 936). The question, therefore, under the first part of the first plea in abatement, is whether Mr. Stockwell, at the time he was placed upon the grand jury, was a "prosecutor or complainant upon any charge against such person" within the meaning of the statute. It is strenuously urged on behalf of respondent that because Stockwell, before he was called to the grand jury, had the minutes of the testimony taken by him in the bankruptcy proceeding and as a United States commissioner had made an investigation which included a consultation with the United States district attorney with a view to issuing a Federal warrant against the respondent upon the same state of facts relied upon in the case at bar, he should therefore be held to be a "prosecutor" within the meaning of the excluding statute. It should be observed that the plea does not allege that any warrant

against respondent was issued by Stockwell, but only alleges that Stockwell considered the testimony taken in the bankruptcy proceeding "with a view of issuing a warrant." A "prosecutor" is said to be "one who instigates the prosecution upon which the accused is arrested." *State v. Cohn*, 9 Nev. 179, 191; *Phillips v. Bevans*, 23 N. J. Law, 373; *United States v. Sandford*, 27 Fed. Cas. p. 952. As defined by Bouvier, a "prosecutor" is "one who prefers an accusation against a party whom he suspects to be guilty." A prosecutor cannot exist unless there is a prosecution, and a prosecution involves the idea of a formal complaint, information, or indictment filed against the criminal. *People v. Garnett*, 129 Cal. 364 (61 Pac. 1114); *Day v. Inhabitants of Otis*, 8 Allen (90 Mass.), 477. We think it clear that Stockwell was neither "prosecutor or complainant" within the meaning of the statute.

The second part of the first plea avers, upon information and belief, that the minutes of the testimony taken before Stockwell in the bankruptcy proceeding were used and read before the grand jury as evidence against respondent by Stockwell. Assuming that this averment is intended by the pleader to strengthen the claim that Stockwell was a "prosecutor" within the meaning of the statute, it requires no further discussion; if, however, the pleader intended, by including this averment in the first plea, to charge that the indictment was founded upon incompetent testimony, the plea would fail for duplicity. *Findley v. People*, 1 Mich. 234, where it is held that a plea which states several distinct facts having no relation or dependence upon each other is bad for duplicity.

The mere fact that incompetent, improper, and irrelevant testimony was received and considered by the grand jury is not fatal to the indictment, unless such testimony is the only testimony considered by them.

People v. Lauder, 82 Mich. 109 (46 N. W. 956), and cases there cited and discussed.

The second, third, fourth and fifth pleas in abatement are not discussed by counsel for respondent.

The sixth plea in abatement is argued by counsel for respondent, but the argument refers rather to the use of the testimony given by respondent in the bankruptcy proceeding before the grand jury than to the fact that respondent himself was required to give testimony before the grand jury which is the gravamen of the plea. The same point was raised in the case of *People v. Lauder*, *supra*, and was there passed upon contrary to the contention of the respondent.

With reference to the seventh plea in abatement, it is sufficient to say that the matter urged as an objection to the validity of the action of the grand jury is outside the provisions of the statute, and cannot be considered on a motion to quash the indictment.

It is argued on behalf of respondent that the court erroneously refused to direct a verdict for defendant at the close of the people's case upon the ground that there was no evidence upon which the jury could properly predicate a verdict of "guilty." Of course if there was any evidence of respondent's guilt, its weight and sufficiency were for the jury. *People v. Eaton*, 59 Mich. 559 (26 N. W. 702). The statute under which respondent was indicted (section 11565, 3 Comp. Laws [3 Comp. Laws 1915, § 15310]) provides:

"If any officer, agent, clerk, or servant of any incorporated company, or of any city, township, incorporated town, or village, school district, or other public or municipal corporation, or if any clerk, agent, or servant of any private persons, or of a copartnership, except apprentices and other persons under the age of sixteen years, shall embezzle or fraudulently dispose of or convert to his own use, or shall take or secrete with intent to embezzle and convert to his own use, without consent of his employer or master, any

money or other property of another, which shall have come to his possession, or shall be under his charge by virtue of such office or employment, he shall be deemed by so doing, to have committed the crime of larceny."

After a careful examination of the record in this case we are unable to agree with the contention of counsel for respondent that it contains no evidence tending to prove that the moneys taken and received by the respondent from the Michigan Buggy Company under the guise of "salary" were so taken knowingly and wilfully, and with the deliberate intention of embezzling them. It would avail nothing to point out the evidential matter which in our opinion justifies this conclusion.

Reference is made to the preceding statement of facts. It should be said in this connection, however, that some of the facts stated may rest upon the admission of incompetent testimony, which will be hereinafter discussed, but with the elimination of these there still remains sufficient, in our opinion, to carry the case to the jury.

Section 7, par. 9, chap. 3, of the bankruptcy act (Act July 1, 1898, chap. 541, 30 U. S. Stat. 548, 1 Fed. Stat. Annotated, p. 560) provides that it is the duty of the bankrupt to—

"submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate; but no testimony given by him shall be offered in evidence against him in any criminal proceeding."

It will be remembered that in the bankruptcy proceeding involving the affairs of the Michigan Buggy Company the respondent was examined, and that during the period covered by his examination he was vice president and a director of the bankrupt corporation.

Upon his trial in the case at bar the people offered in evidence his testimony given in the bankruptcy proceeding. Strenuous objection was made on behalf of the respondent to its reception, but it was received, and much of it was read to the jury. To this action by the court respondent duly excepted.

On behalf of the people it is argued that respondent is not the bankrupt, and therefore that the provision of the statute does not apply to his testimony. On the other hand, counsel for respondent insist that, as corporations can act only through their officers who are natural persons, a reasonable interpretation of the statute would include officers of bankrupt corporations within the term "bankrupt." With this view of the statute we are inclined to agree. The purpose of the statute would seem to be to secure from the bankrupt all information with reference to the bankrupt estate which would facilitate its orderly and economic administration. If the testimony of officers of bankrupt corporations may afterwards be used against them in criminal proceedings growing out of facts involved in the bankruptcy, they will be found reluctant to testify, and probably relying upon their constitutional privileges in refusing to testify. Under this view it follows that the admission of the testimony given by respondent in the bankruptcy case was erroneous, and we are unable to say that such error was without prejudice, although without the use of such testimony the jury might have reached the same result. Upon the trial Frank B. Lay, Sr., and Victor L. Palmer were both called as witnesses by the people. Both declined to testify as to facts within their knowledge concerning the charge against respondent, claiming constitutional privilege. Respondent himself did not take the stand, but, as before pointed out, his testimony, taken in the bankruptcy proceeding, was read.

During the argument of the prosecuting attorney to the jury the following occurred. He said:

"I have not a word to say about this respondent or Mr. Palmer testifying here, but I do have a word to say about this. * * *

"Mr. Irish: I except to that part of the argument.

"The Court: I will say that the prosecuting attorney has no right to comment upon the failure of the accused to testify, and he should refrain from making any comment or any suggestion of any sort relative to the failure of the respondent to testify, and the jury will disregard the same absolutely.

"And, again, if this salary proposition that is here in question was operated only (openly), legally, and above board, why haven't the facts been put on here by those witnesses who refused to testify, who knew considerable about it.

"Mr. Irish: We except to that, we are not responsible for that.

"The Court: That is true, the respondent is not responsible for his father's failure to testify, or Mr. Palmer's either.

"Mr. Frazer: We ask the court to instruct the prosecuting attorney that he has no right to talk about that to the jury.

"The Court: The refusal of Mr. Palmer or F. B. Lay, Sr., to testify, in and of itself, can raise no presumption against the respondent.

"Mr. Frazer: Give me an exception.

"And again: After we have brought all this before you, are you going out and say that this respondent is not guilty of improperly and illegally taking the funds of this company?

"Mr. Irish: I would like to save the point as to the remarks of the prosecuting attorney giving his opinion."

Other remarks of the prosecuting attorney or his assistant were made in the course of the argument, referring to the fact that two of the witnesses, Lay, Sr., and Palmer had stood on their constitutional privi-

lege. The statute (section 10211, 3 Comp. Laws [3 Comp. Laws 1915, § 12552]) provides:

“That a defendant in any criminal case or proceeding shall only at his own request be deemed a competent witness, and his neglect to testify shall not create any presumption against him, nor shall the court permit any reference or comment to be made to or upon such neglect.”

This statute and alleged breaches of it have been under consideration by this court in the following cases: *People v. Evans*, 72 Mich. 367 (40 N. W. 473); *People v. Payne*, 131 Mich. 474 (91 N. W. 739); *People v. Hammond*, 132 Mich. 422 (93 N. W. 1084); *People v. Cahill*, 147 Mich. 201 (110 N. W. 520); *People v. Mitchell*, 164 Mich. 583 (129 N. W. 698); *People v. Peterson*, 166 Mich. 10 (131 N. W. 153). In all these cases remarks of the prosecuting attorney with reference to the failure of the accused to take the stand were held to constitute reversible error. In the case at bar the record discloses no remarks on the part of counsel for respondent which would tend to excuse or justify the criticism of the prosecuting attorney. The statute does not prohibit reference to the fact that witnesses other than the accused have failed to testify, though in our opinion such reference might well have been omitted. Many assignments of error are based upon the charge of the court. Certain isolated sentences, taken alone, may be subject to criticism, but, as a whole, the charge is full, fair, and, in our opinion, carefully preserved every substantial right of the respondent.

Because of the errors pointed out, the judgment is reversed, and a new trial ordered.

STONE, C. J., and KUHN, OSTRANDER, MOORE, STEERE, and PERSON, JJ., concurred. BIRD, J., did not sit.

CLARKE v. WAYNE CIRCUIT JUDGE.

1. DIVORCE—APPEARANCE—AFFIDAVIT OF NONRESIDENCE—TIME.

In a suit for divorce, in which the complainant filed an affidavit of nonresidence that was sworn to on the day preceding commencement of the cause, the court could not properly decline to issue an order for appearance for the alleged reason that the affidavit should have been made after the commencement of suit, although the order must not be made until after the suit is commenced. 1 Comp. Laws, § 485, as amended (3 Comp. Laws 1915, § 12449).

2. SAME—INTENT—PERJURY—ESSENTIALS.

A purported affidavit, on which perjury could not be assigned if it was wilfully false, would not, in law, be an affidavit at all.

3. SAME—TITLE—PRACTICE.

As a general rule an affidavit should be entitled in the suit in which it is to be used. If there be no suit pending at the time, it should not be entitled. It was formerly held if a suit was pending and the affidavit was entitled in a suit not pending, it was a nullity.

4. SAME—ENTITLING AFFIDAVIT—STATUTE.

That the affidavit was entitled in the contemplated suit was not a sufficient reason for treating it as invalid. It was made to be used in the suit, and was so used, and perjury could be assigned upon the statements made therein, if false. 3 Comp. Laws, § 11306, 3 Comp. Laws 1915, § 14973.

Mandamus by Cecil Clarke against George S. Hosmer, circuit judge of Wayne county, to require respondent to proceed and dispose of a suit for divorce. Submitted June 26, 1916. (Calendar No. 27,272.) Remanded September 26, 1916.

McHugh, Gallagher, O'Neil & McGann, for relator.

PERSON, J. This is an application for a writ of mandamus, and grows out of the following facts: Relator, a resident of Detroit, began suit in Wayne county to obtain a divorce from her husband, George Clarke, who, at the time, was a nonresident of the State. Her bill of complaint was verified on the 23d day of September, 1915, but was not filed, so as to begin the suit, until the following day, that is, the 24th. After filing the bill, and on the same day, she obtained an order for the appearance of the defendant, and this order was duly published; but the affidavit of nonresidence, upon which it was based, had been sworn to on the preceding day, when the bill of complaint was verified, and before the suit was begun. After the time designated in the order for the defendant's appearance had expired, his default was entered, and the cause came on for hearing. Plaintiff's proofs were received, and the circuit judge presiding announced that they were of such a character as to entitle her to a divorce. And this opinion as to the effect of the proofs he repeats, in substance, in his return to this court. But, having discovered during the hearing that the affidavit of nonresidence was entitled in the cause, and that it had been sworn to before the suit was begun, he was also of the opinion that it was a nullity, that the order of publication based thereon was void, and that he was without jurisdiction to proceed with the case. Consequently he declined to sign and enter any decree. In opposition to this latter opinion of the circuit judge, it is insisted on behalf of relator, the complainant, that the affidavit of nonresidence was not rendered ineffective by the facts stated, and it is asked that this court direct the circuit judge to proceed and dispose of the suit.

The statute which provides for service on nonresident defendants reads, so far as quotation is necessary in this case, as follows:

"After the filing of a bill, the circuit judge or circuit court commissioner shall make an order for the appearance of the defendant, at a future day therein to be specified, as hereinafter directed in the following cases:

"*First*. When the defendant resides out of this State, upon proof by affidavit of that fact." 4 How. Stat. (2d Ed.) § 12003 (1 Comp. Laws, § 485, 3 Comp. Laws 1915, § 12449).

The use of the affidavit as proof upon which to issue the order is specifically authorized by the statute, and, while the order itself may not be made until after the commencement of the suit, there is no such statutory prohibition as to the affidavit. Nor is it suggested in the case at bar that an unreasonable period of time had elapsed between the making of the affidavit and the issuance of the order. *Adams v. Wayne Circuit Judge*, 98 Mich. 51 (56 N. W. 1051).

The circuit judge did not, however, condemn the affidavit because it was made on the day before the order was issued, but because, having been made when no suit was pending, and having been entitled in a cause not yet begun, it could not, in his opinion, even if wilfully false, be made the basis of a prosecution for perjury. And if this were so, the action of the circuit judge could not well be questioned, for a paper, purporting to be an affidavit, but upon which perjury could not be assigned if it were wilfully false, would not, in law, be an affidavit at all. The opinion of the circuit judge was undoubtedly based upon the remarks of Justice CHAMPLIN in *Beebe v. Morrell*, 76 Mich. 114, 119 (42 N. W. 1119, 1121, 15 Am. St. Rep. 316), where it was said:

"The general rule is that the affidavit must be entitled in the suit in which it is to be used. If there be no suit pending at the time, of course the affidavit must not be entitled. If a suit be pending, and the

affidavit is entitled in a suit not pending, the affidavit is a nullity. It is stated that the reason why the affidavit must be properly entitled is that otherwise perjury cannot be assigned upon it. And it is said that this rule had its origin in England. But an examination of the English cases will show that the rule there laid down was that affidavits for attachments for contempt, and to hold to bail, and others of that class, made when no suit was pending, if entitled, would be nullities, because no suit was pending in which they were entitled, and hence perjury could not be assigned upon them."

But the point before us now was not in issue nor decided in the *Beebe Case*, and the Justice was simply referring generally to what has sometimes been said to have been the common-law rule as to entitling affidavits. He refers particularly to affidavits to hold to bail, yet Judge Brady, in *City Bank v. Lumley*, 28 How. Prac. (N. Y.) 397, said:

"The effect of entitling an affidavit to hold to bail, though said to be a nullity, has never been so declared in any case involving the question which I have been able to find after diligent search."

And the following statement with reference to the same matter may be found in 1 Tidd's Practice 180:

"There being no action depending in court at the time when the affidavit is made, it ought not regularly to be entitled in a cause, and in one case the King's Bench discharged the defendant out of custody on common bail, on account of its being so entitled. But in a subsequent case they thought, as the practice had obtained so long of adding a title to affidavits of this kind, it would be too much to determine that such practice had been erroneous, particularly as this had been a mere question of form, and did not interfere with the justice of the case. A rule of court, however, has since been made in the King's Bench that 'affidavits of any cause of action before process sued out

to hold defendants to bail, be not entitled in any cause, nor read if filed.' ”

We have no express rule on the subject in this State. And affidavits entitled in the cause, and sworn to before the action was begun, have been held good by several courts. *City Bank v. Lumley, supra*; *Crombie v. Little*, 47 Minn. 581 (50 N. W. 823) ; *Becker v. Linton*, 80 Neb. 655 (114 N. W. 928, 127 Am. St. Rep. 795). In *People v. Fox*, 25 Mich. 492, it was said:

At common law “perjury is committed ‘when a lawful oath is ministered by any that hath authority, to any person in any judicial proceeding, who swear eth absolutely and falsely in any matter material to the issue or cause in question.’ 3 Inst. 164; 4 Bl. Com. 137. There must be an oath authorized by law, an issue or cause to which facts were material, and a false statement regarding such facts upon such issue, or in such cause.”

Our statute, however, gives a much broader definition to perjury, and provides that:

“If any person authorized by any statute of this State to take an oath, or if any person of whom an oath shall be required by law, shall wilfully swear falsely, in regard to any matter or thing, respecting which such oath is authorized or required, such person shall be deemed guilty of perjury.” 3 Comp. Laws, § 11306 (3 Comp. Laws 1915, § 14973, 5 How. Stat. [2d Ed.] § 14719).

We think this statutory definition of perjury broad enough to include the affidavit in question if wilfully false. The affidavit itself was authorized by statute, and was sworn to on the same day with the bill of complaint by which the suit was to be begun. It was made to be used in the suit, and was so used. And we do not think that it was made void by being entitled in the contemplated cause, and sworn to before the bill had been filed.

From what has been said it is to be presumed that the learned circuit judge will proceed in the suit for divorce and render a final decree therein, and that the issuance of the writ will not be required.

STONE, C. J., and KUHN, OSTRANDER, BIRD, MOORE, STEERE, and BROOKE, JJ., concurred.

CINADAR v. DETROIT, GRAND HAVEN & MILWAUKEE
RAILWAY CO.

1. RAILROADS—NEGLIGENCE—CROSSING ACCIDENTS.

Where a young man, familiar with a railroad crossing and in possession of all faculties, and knowing that a fast passenger train was about due, was struck and killed by the engine, and there was testimony of various eyewitnesses who did not see the plaintiff until his vehicle was directly upon the track, and where the plaintiff relied in making his case upon the presumption that decedent was in the exercise of due care, the evidence also showing that his view was almost wholly obstructed until his horse was on the tracks, it could not be held as a matter of law that the deceased did not exercise an ordinary degree of care, and the trial court did not err in submitting the issue to the jury.

2. SAME—EVIDENCE—NEGLIGENCE.

Held, also, in passing on the question of negligence in giving the crossing signals, that the testimony of several witnesses, though negative in character, that from a position in which they might have heard they did not hear the signals given, was sufficient to carry the question to the jury.

Error to Oakland; Smith, J. Submitted June 19, 1916. (Docket No. 34.) Decided September 26, 1916.

Case by Grace Cinadar, administratrix of the estate of Charles Cinadar, deceased, against the Detroit, Grand Haven & Milwaukee Railway Company for the negligent killing of plaintiff's intestate. Judgment for plaintiff. Defendant brings error. Affirmed.

Harrison Geer (*W. K. Williams*, of counsel), for appellant.

W. T. Hosner (*Pelton & McGee*, of counsel), for appellee.

STONE, C. J. The plaintiff, who was duly appointed administratrix of the estate of her deceased husband, Charles Cinadar, brings this suit against the railway company to recover damages for his instantaneous death, which occurred at the intersection of Sixth street and defendant's railroad in the village of Royal Oak, Oakland county, on September 22, 1913, at 5:15 p. m., while decedent was driving a single horse hitched to a wagon loaded with coal, in a westerly direction over defendant's crossing, through being struck by defendant's north-bound passenger train No. 21. Defendant's depot, which was a freight and passenger depot combined, was located just beyond the northerly line of Fourth street, and on the easterly side of the main line. Fifth street is a block south of Fourth street, and a block farther south is Sixth street, another block south is Seventh street, and a block still farther south is Eighth street. All of these numbered streets run east and west. They are crossed at right angles by Main street, which is the principal thoroughfare in the village, and is substantially 91 feet in width, and extends due north and south.

Defendant's railroad runs 15 degrees west of north

while passing through Royal Oak. Main street crosses the railroad near the intersection of Main and Seventh streets. The distance from the center of Main street at its intersection of Sixth street west to the center of defendant's main line track is 115 feet. It is a considerably greater distance from the intersection of Main and Fifth streets to the center of the track, and that distance increases as you go north.

Defendant's is a single main track railroad, so called. At the time of the accident there were three tracks crossing Fifth street, the easterly and westerly being sidings, and the center one the main line. Decedent was employed as a teamster by the Millen-Wright Company, lumber and coal dealers at Royal Oak. Their office and sheds faced Fifth street on the south side thereof, and were east of the three tracks of the defendant. A hardware store was located in the northeast portion of the main building. Edward Joyce, foreman for Millen-Wright Company, had his office in a portion of this store. Their buildings and sheds extended north and south the entire distance between Fifth and Sixth streets. Main street ran along the east side of their buildings. Five tracks of defendant crossed Sixth street, namely, the three tracks above mentioned as crossing Fifth street, a track which was most easterly leading from the east siding within the triangle formed by Sixth and Main streets and extending into the sheds of the Millen-Wright Company. This was a stub track, and used for the purpose of serving that industry. The fifth track was the most westerly crossing Sixth street, and was also a stub track, and was used as a team track. The condition as to the number of tracks at the Main street crossing near Seventh street, was the same as at Fifth street. The distance from the east side of the Millen-Wright Company building at Sixth street to the main track of defendant, was 69½ feet. The distance

from the crosswalk over Sixth street at the west side of Main street to east rail of the Millen-Wright Company track—the most easterly track on Sixth street—was 38 feet. It was $17\frac{1}{2}$ feet from the center of this track to the center of the siding next west, and $14\frac{1}{2}$ feet from the center of this siding to the center of the main line. It was therefore 32 feet from the center of the easterly siding to the center of the main line.

A driveway 20 feet wide led north from Sixth street into the Millen-Wright Company sheds. It was near the easterly siding. The distance from the south line of Sixth street to the north line of Seventh street was 245 feet, and the distance from the center of the main line crossing at Sixth street to the center of the railroad crossing at Main street was 239 feet. There was no flagman, gates, or bell at the Sixth street crossing, and never had been so far as the record discloses, but there was a flagman at the Main street crossing near Seventh street. Lawson's lumber and coal yard was situated east of Main street and at the north side of Seventh street. The Millen-Wright Company siding would hold one box car between the south crosswalk at Sixth street, and the west crosswalk on Main street. At the time in question a box car stood between Sixth and Main streets, the northerly portion of which car was upon the Millen-Wright Company siding, and the southerly portion of the car was upon the east siding proper. Another box car stood east of the Main street sidewalk opposite Lawson's coal shed. These cars would, in a measure, obstruct the view of a person driving south on Main street, or west on Sixth street, of a train approaching upon defendant's main line track from the south.

Train No. 21, a regular train, was scheduled to pass through the village of Royal Oak without stopping at 5:14 p. m. As we have stated, the accident occurred at 5:15 p. m. It was still daylight. Many persons in

the village were familiar with the fact that this train passed through every afternoon about 5:15 p. m. without stopping. The decedent had, for upwards of a year and a half before his death lived near the village of Big Beaver, which was northeast of Royal Oak. He was 26 years of age, and left surviving him the plaintiff, who was 25 years old, and their infant son, 19 months old. He went to work for the Millen-Wright Company about 4½ months before the day in question. He was first employed at work about their yard in unloading cars and loading wagons. Later he was given steady employment as one of their teamsters. His pay was \$15 per week. After he was employed as a teamster his work required him to deliver coal, lumber, etc., to the customers of this company about the village of Royal Oak. The said employers kept their horses in a barn located west of defendant's tracks, and it was therefore necessary that the decedent cross these tracks several times daily. It was also necessary for him to cross the tracks whenever he made a delivery west of Main street. Decedent had passed over the various crossings of defendant, among them the Sixth street crossing, many times. He had, at the time in question, loaded his wagon with coal taken from a car standing near Fifth street on the siding east of the main line. Having completed his load, he drove north to Fifth street, turned east upon that street, and proceeded to Main street, where he turned south, and drove to the scales located just east of the west sidewalk at Main street, and between Fifth and Sixth streets. Foreman Joyce weighed the coal for decedent. The latter then proceeded south down Main street as far as Sixth street, where he turned west. As he drove south from the scales the car near Lawson's coal shed, and just east of the easterly walk along Main street, was in plain view, and when he arrived near the intersection of Main and Sixth streets,

the car which stood just south of the south walk on Sixth street was also in plain view. The train was running about 30 miles an hour when it struck and killed decedent. The railroad track was straight from the depot southerly for some distance beyond Eighth street.

Defendant moved the court at the close of plaintiff's evidence for a directed verdict, for the reasons: *First*, that plaintiff had failed to show negligence upon the part of the defendant; and, *second*, that decedent was, as matter of law, guilty of contributory negligence. The motion was denied by the court, and defendant's counsel duly excepted. The motion was renewed at the close of all the evidence, for the same reasons, and was again denied, and exception taken. The trial court submitted to the jury the one question of fact as to the negligence of defendant, viz., whether a crossing signal had been sounded. It further submitted to the jury the question whether or not decedent had been guilty of contributory negligence in the premises. The jury returned a verdict for the plaintiff for \$4,084.87, and judgment was entered accordingly.

The defendant has brought the case here for review, and by appropriate assignments of error it is claimed:

(1) That the decedent was guilty of contributory negligence as a matter of law, and the trial court should so have instructed the jury.

(2) That defendant was not guilty of any negligence in the premises, and the trial court should have thus instructed the jury.

1. Was decedent shown to have been guilty of contributory negligence as matter of law? It is urged by appellant that decedent, a young man in the possession of all his faculties, familiar with his surroundings, knowing that his view was in a measure obstructed, and that a regular scheduled fast passenger train was due, was bound to stop his horse and listen to ascer-

tain whether a train was in close proximity to that crossing. It is said that, had he stopped his horse, he could have heard the noise of the approaching train and avoided this accident. Others some distance north of Sixth street heard the noise of the train when it was still south of Eighth street. We quote from appellant's brief:

"The law of this State was settled at an early day, and has been repeatedly followed by the decisions of this court, to the effect that a railroad crossing is ever a warning and notice of danger to any person intending to pass over the same. It is the duty of such person to make use of his senses, both of hearing and sight, and if for any reason either of these senses cannot be rendered available, the obligation to use the other is then the stronger, in order that such person may ascertain whether a train is approaching in dangerous proximity to such crossing before he places himself in a position of danger. If such person neglects to take these precautions, and ventures blindly upon the track, it is at his own risk. The law requires a great degree of care to be exercised in making these crossings. Where a person is familiar with the surroundings existing at a railroad crossing, and knows that a regular train is due at that time, he is under the highest possible obligation to observe such precautions as are needful to avoid a collision. In the case at bar a greater degree of care was imposed upon the decedent from the fact that he knew the conditions there existing, knew that a train was due at that time, and that his view to the south was in a degree obstructed. It was clearly his duty to bring his horse to a standstill while he was yet in a place of safety, in order that the noise made by his wagon as he drove along might cease, and he be given an opportunity to determine whether the fast passenger train then due was in close proximity to the Sixth street crossing. He did not stop, and, under the repeated decisions of this court, was guilty of contributory negligence as matter of law."

Counsel cite many of our decisions and quote from the following: *Haas v. Railroad Co.*, 47 Mich. 401-

407 (11 N. W. 216); *Brady v. Railroad Co.*, 81 Mich. 616-623 (45 N. W. 1110); *Shufelt v. Railroad Co.*, 96 Mich. 327-329 (55 N. W. 1013); *Jensen v. Railroad Co.*, 102 Mich. 176-180 (60 N. W. 57); *Phillips v. Railway Co.*, 111 Mich. 274-276 (69 N. W. 496, 66 Am. St. Rep. 392). Appellant's counsel further say:

"Counsel for plaintiff may say that there is a presumption of law in this State that a person killed at a railroad track did stop, look, and listen. We admit there is such presumption, but say that when, as in the case at bar, there is affirmative, direct, and credible testimony that deceased went upon the track without stopping to look and listen, such presumption is rebutted and displaced."

And the following cases are cited: *Mynning v. Railroad Co.*, 64 Mich. 93 (31 N. W. 147, 8 Am. St. Rep. 804); *Underhill v. Railway Co.*, 81 Mich. 43 (45 N. W. 508); *Schremms v. Railroad Co.*, 145 Mich. 190 (108 N. W. 698, 116 Am. St. Rep. 291); *Schwartz v. Railroad Co.*, 153 Mich. 40 (116 N. W. 540, 17 L. R. A. [N. S.] 1253); *Baker v. Delano*, 191 Mich. 204 (157 N. W. 427).

Upon this point counsel for appellant urge in conclusion that in the instant case there is no presumption that decedent was in the exercise of due care, because the testimony of Frank Reynolds, John McKay, Joseph Mow, Caroline Mow, Fred C. Anderson, Ed. Truedell, and Joseph P. Stanch shows clearly that he did not exercise such care as the law required.

It can be said that the plaintiff introduced no testimony showing what care and caution decedent exercised in approaching the crossing, nor was it shown whether he stopped his horse and looked or listened. Upon the testimony as the plaintiff left it, the jury might have inferred that decedent approached the track with due care, or at least they might have relied upon the presumption of law above referred to. Was

this presumption overcome by evidence? Upon this subject, and after referring to the witnesses named by appellant, counsel for the plaintiff say in reply:

‘In view of the confident assertions made by counsel, we are obliged to refer somewhat at length to the testimony of these respective witnesses, and direct the court’s attention to this important question: ‘At what point did these witnesses see the decedent?’ The only time that witness Frank Reynolds saw the decedent was when he was passing through the 20-foot space, as he puts it: ‘I had a view of about 20 feet there while he was passing in front of me. * * * I couldn’t see Mr. Charles Cinadar when he went on the track; he had gone out of my sight.’ The most, therefore, that can be claimed from the testimony of this witness is that Cinadar did not stop while he was passing this 20-foot space. Whether he had stopped before or after is not known, and no one testifies either way on that question.

“Mrs. Mow is referred to as supporting their contention that Cinadar did not stop. On cross-examination she was asked: ‘And the first you saw of him was on the main track just before he was hit?’

“‘A. Yes, sir.

“‘Q. Now, that is true, isn’t it?

“‘A. Yes, sir.’

“This apparently was not satisfactory to counsel, and on redirect examination she was again asked:

“‘Q. Now, Mrs. Mow, so that there may be no mistake, where was the horse when you first saw it?

“‘A. Well, it was right on the main track walking.

“‘Q. How?

“‘A. He was on the track, hind feet, and the man was right on the main track when I saw him.’

“In other parts of her testimony this witness declares that the horse had not yet reached the track, but here the question was put to her directly, first on cross-examination, and later by her own counsel, and on both occasions she declared the horse was on the main track when she first saw it. And finally she says: ‘He gave the danger signal just before he struck him. That attracted my attention to the man. * * * When the engineer blew the whistle I knew it was

danger. I looked up the track.' It is apparent, therefore, that this witness was paying no attention until she heard the danger signal and then discovered the horse on the track, as she says.

"Fred C. Anderson says he heard the engineer giving signals the minute he saw the horse coming up. In the conclusion of his testimony he says: 'The first I saw of the horse it was west of the box car. I couldn't tell just where it was. I looked and the train came up and hit him.'

"Ed. Truedell testified:

"'Q. Did you testify before the coroner's inquest the first you saw the horse he was on the main track?

"'A. Yes; just driving across.

"'Q. That was the first you saw of him, just driving across?

"'A. Yes, sir.'

"Joseph P. Stanch says: 'I think the first I saw of the horse and man was when the horse was on the track; I mean the main track.' There is not, therefore, a single line of the testimony of any of these men that Cinadar did not stop and listen for the approaching train. There remains only the testimony of Mr. McKay, the engineer. He could see nothing until he had reached the open space between the two box cars, as he says: 'When I reached a point where I could see through an open space, I saw him driving up west toward the track.' It is apparent, therefore, that Cinadar was at the time east of the east side of the box car. Witness then says: 'I gave six or seven sharp blasts of the warning whistle. I first saw him when he was east of the box car. The engine was coming up Main street. I was on the right-hand side of the cab. That would be about Seventh street, after I had seen him. I looked at him. The box car was in between us.

"'Q. And the second time you gave the signal that was the last time, you say you were then about 30 or 40 feet of this track where he was hit?

"'A. Yes, sir.

"'Q. He was about 15 feet east of the track?

"'A. Yes, sir; I only gave one danger signal when I saw him; he was east of the car and was on Sixth street.

“Q. Then he was east of the track how many feet would you say, 30 or 40, at that time when you gave him the danger signal, when you gave him these signals at Seventh street, these five or six sharp blasts, as you say?

“A. I don't know whether it was right there at Seventh street, it was when I could see him.

“Q. When you could see him east of the box car?

“A. Yes, sir.

“Q. Well, wouldn't that be about 30 or 40 feet east of the main line?

“A. Thirty or 40 feet east of the main line.”

We have examined all of the testimony with great care. Some parts of the testimony are inconsistent with other parts. If we should consider the testimony most favorable to the plaintiff upon this question, it must be said that, aside from the time decedent was passing the opening of 20 feet, and when he was on the main track in a place of danger, no one accounts for him. It is decedent's conduct prior to reaching the danger zone, the track, that is material, and it is urged by plaintiff that there is no direct testimony on that point, and that the presumption of law is that he did stop, look, and listen. It is the claim of the plaintiff that it was impossible for decedent to have seen the train until he had cleared the extreme westerly side of the box car, and then his horse was on the track. While we consider the question of contributory negligence a close one, we are of the opinion that it cannot be said that the decedent did not exercise the care that an ordinarily prudent man would have exercised under like circumstances, and we think that the question was properly submitted to the jury. *Schremms v. Railroad Co., supra.*

2. Were the crossing signals given? The testimony upon this subject is so voluminous that we cannot quote it here. We have examined it with great care. A number of witnesses testified pro and con upon this

issue. There is much discussion by counsel of "negative" and "affirmative" testimony. The claim of the appellant is that plaintiff wholly failed to make out a case, and that there was no evidence that warranted the trial court in submitting the question to the jury; that plaintiff's proof was negative testimony of no probative force, creating no conflict of evidence, and hence presenting no question for the jury. The real question is: "Were signals given at the time and place?" This question can find its answer from those in a position and under such conditions that they probably would have heard the signal if given.

"The courts have often been asked," says Wigmore, "to exclude testimony based on what may be called negative knowledge; i. e., testimony that a fact did not occur, founded on the witness' failure to hear or see a fact which he would supposedly have heard or seen had it occurred. But there is no inherent weakness in this kind of knowledge. It rests upon the same data of the senses. It may even be sometimes stronger than affirmative impressions. The only requirement is that the witness should have been so situated that in the ordinary course of events he would have heard or seen the fact had it occurred." 1 Wigmore, Ev. 664; 2 Elliott, Ev. 969.

In *Crane v. Railroad Co.*, 107 Mich. 511 (65 N. W. 527), it was held that testimony of persons who were near a railroad crossing at the time of an accident, and whose attention had been directed to an approaching train, that they did not hear the train whistle for the crossing, was sufficient to justify a finding that the whistle was not sounded, although other witnesses testified positively that the signal was given. The jury are to take all the facts and circumstances into consideration. This rule was again stated in *Lonis v. Railway Co.*, 111 Mich. 458 (69 N. W. 642). The Michigan cases cited by appellant are reviewed in *Tietz v. Railway Co.*, 166 Mich. 205 (131 N. W. 710), and

193 Mich.—4.

the rule as declared in the *Lonis Case* approved. See, also, *Hinkley v. Railway Co.*, 162 Mich. 546 (127 N. W. 668).

We are of the opinion that the testimony upon this branch of the case presented a question of fact which was properly submitted to the jury.

We find no reversible error in the record, and the judgment of the circuit court is affirmed.

KUHN, OSTRANDER, BIRD, MOORE, STEERE, BROOKE, and PERSON, JJ., concurred.

McDONALD v. HALL.

1. ACTION—PLEADING—JOINDER OF CAUSES—PRACTICE.

It is settled practice in this State that a plaintiff may join all of his causes of action in one declaration and have them all tried in one suit, if in separate suits he could recover on each, in the same form of action.

2. PLEADING—DECLARATION—NOTICE.

The object of the declaration being to apprise the defendant and the court of the grounds of the pleader's claim, to give the defendant fair notice of the case he is called to meet, a plain and clear statement of the facts constituting the wrong complained of is sufficient, if expressed with reasonable certainty.

3. SAME—EVIDENCE.

It is neither necessary nor proper to allege matters of evidence in a pleading; only ultimate facts should be alleged, not the circumstances which tend to prove them.

4. SAME—COUNTS.

The theory of separate counts is that each is a complete cause of action, as distinct from others as if it stood alone, and the separate counts are as distinct as if they

were in separate declarations, consequently they must contain all necessary allegations, or the latter must expressly refer to the former.

5. **SAME—COUNTS—SEPARATE CAUSE OF ACTION.**

While a single count must cover but a single cause of action, yet where a single and continuous purpose runs through an entire transaction made up of various acts, each of which might alone constitute a cause of action, it is proper to set out all the facts in one count as a single cause of action.

6. **SAME—JOINDER OF PARTIES—JOINT ACT—COUNT.**

Where several defendants are charged in one count of a declaration with having made an assault, it sufficiently appears to be a joint act; certainty to a certain intent in general being all that is required.

7. **SAME—COUNTS—SEPARATE TORTS—JOINT ACT.**

All the torts leading to one damage or object may be joined in one count.

8. **ACTION — IMMORAL CONTRACT — CRIMINAL ACTS — FRAUDULENT MISREPRESENTATION.**

Where money has been paid or goods delivered in pursuance of a contract that is immoral or criminal, or in violation of a statutory provision, and the parties are in *pari delicto* and *particeps criminis*, the court will leave them where they have placed themselves; but where a party has been fraudulently misled, and the fraudulent misrepresentations are intended to create, and actually do create, in his mind a belief that, under the circumstances represented, the act which he is induced to do is neither illegal nor immoral, he may recover the damages he has sustained notwithstanding a statute makes the act a criminal offense.

9. **PLEADING—EXCESSIVE DAMAGES—DEMURRER.**

Because plaintiff claims too much in his allegation of damages is not ground of demurrer.

10. **SAME—COUNTS—SUFFICIENCY—EVIDENCE.**

Where a count states a cause of action against all of the defendants, whether the evidence will sustain the count is a question this court need not consider on certiorari to review the order of the circuit court in overruling a demurrer to the declaration.

Certiorari to Shiawassee; Dodds, J., presiding. Submitted June 12, 1916. (Docket No. 41.) Decided September 26, 1916.

Case by Hugh McDonald against Louis C. Hall, Sr., and others, for conspiracy and malicious arrest. From an order overruling a demurrer to the declaration, defendants bring certiorari. Affirmed.

Lyon & Moinet (John T. McCurdy, of counsel), for appellants.

A. L. Chandler and James H. Pound, for appellee.

STONE, C. J. This case is before us upon certiorari to the order of the circuit court in overruling the demurrer to the declaration. The declaration and demurrer were filed before the judicature act took effect. The argument and decision occurred after the act took effect. Some question is raised as to the practice, but, as said act provides that all questions theretofore raised by demurrer may be raised by motion to dismiss, we are disposed to determine the questions raised upon their merits. There is much controversy and disagreement as to the number of counts in the declaration, which is a very lengthy document, covering about 30 pages of the printed record. The determination of the number of counts in the declaration will tend to dispose of some of the questions raised by the demurrer. It is settled practice in this State that the plaintiff may join all of his causes of action in one declaration and have them all tried in one suit, if in separate suits he could recover on each, in the same form of action. Our statute provides (section 10400, 3 Comp. Laws, as amended by Act No. 77, Pub. Acts 1905 [3 Comp. Laws 1915, § 12350]) that the distinction between the actions of trespass and trespass on the case is abolished; and in all cases where trespass or tres-

pass on the case had theretofore been the appropriate remedy, either of said forms may be used, as the party bringing the action may elect; and counts in trespass and trespass on the case may be joined in the same action. While a multitude of words is not necessary in a declaration, yet reasonable certainty is required of a pleader's meaning. Our practice neither requires nor encourages the needless repetition of allegations. A plain and clear statement of the facts constituting the wrong complained of is sufficient; the object of the declaration being to apprise the defendant and the court of the grounds of the pleader's claim, to give the defendant fair notice of the case he is called to meet. It is neither necessary nor proper to allege matters of evidence in a pleading; only ultimate facts should be alleged, not the circumstances which tend to prove them. Counts in a declaration have been defined as the different parts thereof, each of which if it stood alone would constitute a ground of action. In an indictment each count should charge a distinct offense.

Another author defines a count in pleading as an entire or integral charge in an indictment, declaration, or other pleading, setting forth a cause of complaint. The theory of separate counts is that each is a complete cause of action, as distinct from others as if it stood alone in the pleading, and the separate counts are as distinct as if they were in separate declarations; and consequently they must contain all necessary allegations, or the latter must expressly refer to the former. 1 Chitty's Pleading (13th Am. Ed.), p. 413. A single count must cover but a single cause of action. *Ives v. Williams*, 53 Mich. 636 (19 N. W. 562).

But the above rule should be considered in connection with the following: When a single and continuous purpose runs through an entire transaction made up of various acts, each of which might alone consti-

tute a cause of action, it is proper to set out all the facts in one count as a single cause of action. 31 Cyc. p. 119, and cases cited in note.

In the recent case of *Green v. Railroad Co.*, 168 Mich. 104, 110 (133 N. W. 956, 959, Am. & Eng. Ann. Cas. 1913C, 98), Justice STEERE, speaking for this court, said:

"While this State has no code, and the common-law form of pleading obtains, special pleadings have been abolished, and numerous innovations and modifications which formerly would not have been tolerated have been introduced, tending to relax technical rules and simplify the practice. Many different causes of action may now be joined in one declaration, where it was formerly forbidden. Assumpsit may be brought on waiver of tort, and the action joined in other causes maintainable in assumpsit. In an action for destruction of one's business and credit, growing out of the breach of a single contract, a series of wrongful acts, aimed at a single result, may be joined in one count. *Oliver v. Perkins*, 92 Mich. 304 [52 N. W. 609]. * * *

"Extreme niceties and technical exactness in form is not favored, and many other authoritative rulings and suggestions along the same lines, familiar to the profession, clearly indicate the tendency to eliminate the ultra refinements and technicalities of old forms of common-law pleading."

In our opinion, the declaration in this case should be held to contain four counts. It is too lengthy to be here inserted. We think that part of the declaration charging all of the defendants with an assault and battery upon the person of G. Irene McDonald, the infant daughter of the plaintiff, must be held to constitute one count. It charges a distinct wrongful act which constitutes a cause of complaint. It is the claim of the defendants that the charge that the defendant Louis C. Hall, Jr., debauched the said infant daughter of plaintiff on January 8, 1915, constitutes another distinct count against that defendant only. But a careful

reading of the declaration leads us to the conclusion that the alleged debauching of the said daughter is introductory only, and is stated by way of inducement to the principal subject of the count, which is an alleged conspiracy of all the defendants to wrong the plaintiff by falsely charging him with a crime in the manner alleged. The declaration states that after the arrest of the defendant Louis C. Hall, Jr., upon the complaint of the plaintiff, and after said Hall was bound over to the circuit court upon the charge of statutory rape upon said daughter, the plaintiff was approached by the defendant Louis C. Hall, Sr., and was told by him that he, the plaintiff, had a right to settle said criminal case, and was induced by the false and fraudulent statements of said defendant Louis C. Hall, Sr., and John T. McCurdy, the attorney of the latter, to agree to accept a sum of money in settlement of said criminal charge, and any claim which the plaintiff might have for damages on occasion of the premises; that the plaintiff was ignorantly induced by said defendants Louis C. Hall, Sr., and William F. Gallagher to go to the bank parlors of the latter, and there to accept the sum of \$5,000 in settlement as aforesaid, and that said defendants, in pursuance of said false representations, caused to be prepared a statement which the plaintiff in his ignorance, and relying upon such allegations, signed, to the following effect:

"I, Hugh A. McDonald, acknowledge the receipt of \$5,000 from L. C. Hall, Sr., in consideration of which I agree to withdraw the complaint in the case of *People v. Louis C. Hall, Jr.*, charged with statutory rape on my daughter, and that neither I or my daughter will give evidence in said case, and to pay the costs of the case now pending in the circuit court for the county of Shiawassee, in an amount not exceeding \$100, and that my daughter shall remain in Canada."

It is further averred that upon the signing of said paper, and in furtherance of the conspiracy, the said defendant William F. Gallagher then and there handed to the plaintiff \$5,000 in cash (here quoting)—

“which this plaintiff then and there put in his pocket, and, after being completely deceived and duped by the various false promises, representations, and inducements offered him and used to induce him to accept said money for the benefit of his child, started to leave the bank parlors, and that said John T. McCurdy then and there in a loud, terrifying voice shouted, ‘Mr. Sheriff, come and arrest this man McDonald for taking money in settlement of a criminal case, and compounding a felony,’ and the defendant Edwin J. Herrick, then and there being hidden somewhere to carry out this criminal conspiracy, and who had been by prearrangement stationed in a convenient place to help to take part in said farce and mockery of getting this plaintiff to take said money and arrest him therefor, stepped forward and seized this plaintiff and told him that he was under arrest, and then and there this plaintiff requested that he might telephone to his brother, or for some legal counsel, and have some friendly witness then and there among the conspirators to protect him and assist him in obtaining his rights under the circumstances; that the said John T. McCurdy then said to this plaintiff, ‘You are not going to have anybody come here until the prosecuting attorney is brought here,’ and then and there coerced, intimidated, and falsely imprisoned this plaintiff until it pleased said McCurdy to let this plaintiff be released; this plaintiff then and there said to said Edwin J. Herrick, ‘Have you any warrant for my arrest?’ to which the said Herrick replied, ‘No’; and this plaintiff then and there started to go towards the door to go about his business; that the said Edwin J. Herrick then clapped his hand on his hip pocket as though reaching for a revolver, and shouted in a loud voice to this plaintiff, ‘Stop,’ and this plaintiff then did stop, and then said McCurdy yelled to this plaintiff in a loud and terrifying voice, ‘You take that money out of your pocket and hand it to the sheriff.’ And this plaintiff

was terribly frightened and terrified by said conduct of John T. McCurdy and Edwin J. Herrick, and by reason of the sheriff's threats and conduct, and the conduct of John T. McCurdy on behalf of said Louis C. Hall, Jr., and of said Louis C. Hall, Sr., and laid the \$5,000 upon the table, when, in furtherance of said unlawful conspiracy of said defendants, it was seized and taken from this plaintiff, and a receipt therefor was given to this plaintiff, which receipt was then and there made by said Edwin J. Herrick and delivered to this plaintiff, in words and figures as follows:

"OWOSSO, MICH., April 5, 1915.

"I acknowledge that upon this day I took Hugh A. McDonald into custody and received from him the sum of \$5,000, which I now have in my possession.

"EDWIN J. HERRICK, Deputy Sheriff."

It is further averred that said Herrick, according to the plan and plot, delivered said money back to the said defendant Gallagher; that, in furtherance of said conspiracy, the defendant Louis C. Hall, Sr., falsely, maliciously, and without probable cause went before a justice of the peace of said city of Owosso, and then and there made a false complaint, charging that this plaintiff, having knowledge of the commission of said crime of rape by said Louis C. Hall, Jr., and that said Hall was under arrest charged with having committed said offense, which offense was a felony, did take money, to wit, \$5,000, upon an agreement in writing not to prosecute the said Louis C. Hall, Jr., for said offense, and not to give evidence thereof. The said complaint prayed for the arrest of this plaintiff, that a warrant was issued by said justice, upon which this plaintiff was arrested and imprisoned for a space of, to wit, two months, at the end of which time, and after divers adjournments, the said Louis C. Hall, Sr., withdrew the complaint, and the said justice dismissed said cause, and discharged the plaintiff from custody, and

that said suit and proceedings are wholly dismissed and at an end. This count concludes as follows:

“Whereby and by reason of said false arrest this plaintiff was compelled to and did lose all compensation for all damages that he had suffered by the debauching of said daughter, which he otherwise would have received, and also lost a great amount of time from his labor, to wit, a period of two months, and was compelled to and did lay out and expend large sums of money for hiring counsel, procuring witnesses, and preparing his case, to wit, the sum of \$200; that said plaintiff was caused great annoyance and vexation, and suffered greatly in his mind and body, by reason of said false and malicious arrest and conspiracy to ruin his reputation; that many people to whom the innocence of this plaintiff was not known in the premises were led to believe, and still believe, that this plaintiff was guilty of a crime of the class known as a felony, to wit, the crime of taking money to settle up a criminal case, as in said warrant alleged; and that his (plaintiff's) reputation and character have been greatly injured, and he has suffered in his mind and body, and been injured in his feelings by reason of the great humiliation, abuse, and deprivation which he has suffered and been compelled to undergo by reason of the fraud and conspiracy of the said defendants, the false arrest, and malicious abuse of process of the county of Shiawassee, by defendants, and otherwise injured in his person and property by reason of the premises in the sum of \$25,000, and therefore he brings suit.”

The third count is a distinct charge against all of the defendants for an assault and battery upon the plaintiff, and for resulting damages.

The fourth count is for the malicious prosecution of the plaintiff by all of the defendants acting together, in and through the defendant Louis C. Hall, Sr.

The joint and several demurrer is based upon the following grounds:

“(1) The first count undertakes to charge all of said defendants with assault and battery upon one G. Irene

McDonald, and does not allege any concert of action or combination in that regard between said defendants.

"(2) For aught that appears in said first count, said plaintiff charges and may seek to recover against said four defendants upon the claim that said defendants at separate and distinct times and places committed separate and distinct individual assaults and batteries upon said G. Irene McDonald.

"(3) It does not appear from the allegations contained in said first count that there is any joint liability of said defendants on account of the various assaults and batteries alleged in said first count to have been committed upon said G. Irene McDonald.

"(4) The second count does not follow the writ, in that it appears that said Louis C. Hall, Sr., Louis C. Hall, Jr., Edwin J. Herrick, and William F. Gallagher have been summoned as defendants in said cause, and said second count purports to be a count against said defendant Louis C. Hall, Jr., alone.

"(5) There is a misjoinder of counts in said declaration in that the first, third, fourth, and fifth counts thereof respectively undertake to state causes of actions against all of said defendants, and the second count thereof undertakes to state a cause of action against only one of said defendants Louis C. Hall, Jr.

"(6) The allegations contained in the third count are so vague, indefinite, uncertain, informal, and insufficient that they do not state a cause of action against all of said defendants.

"(7) It appears by said declaration that said defendant Louis C. Hall, Jr., was and is an infant within the age of 21 years, and it does not appear that he took any part in the various negotiations mentioned and referred to in said third count, except as it is alleged that he acted by and through his attorney and agent, and, being an infant, said defendant Louis C. Hall, Jr., cannot be held liable for all or any of the statements alleged to have been made or the acts alleged to have been done by his said alleged agent.

"(8) Said plaintiff is not permitted to so far stultify himself as to be permitted to allege and claim, as he undertakes to allege and claim in said third count that he did not know or understand that he was en-

gaged in an attempt to compound an alleged felony, as in said count stated.

"(9) Said plaintiff is not permitted to so far stultify himself as to be permitted to allege and claim, as he undertakes to allege and claim in said third count, that he did not know or understand that he was engaged in an attempt to obstruct the course of justice, as in said count stated.

"(10) It appears from the allegations contained in said third count that said plaintiff voluntarily engaged in an agreement to suppress a legal investigation and prosecution concerning an alleged criminal offense and the imposition of due punishment therefor, if such offense had been committed, and was therefore a party to an illegal agreement and cannot base any right to recover upon the results of said illegal agreement, as stated in said third count.

"(11) It appears from the allegations contained in said third count that, if said plaintiff ever had any lawful right of action on account of the alleged debauchery of said G. Irene McDonald he was neither cheated nor defrauded of or lost such right of action.

"(12) It appears from the allegations contained in said third count that, if said plaintiff ever had a right of action on account of the debauching of his said daughter, he did not lose all or any of the compensation and damages which he was entitled to recover therefor.

"(13) Said third count does not state a cause of action against all or any of said defendants.

"(14) The fourth count undertakes to charge all of said defendants with assault and battery upon said plaintiff, and does not allege any concert of action or combination in that regard between said defendants.

"(15) For aught that appears in said fourth count, said plaintiff charges and may seek to recover against said four defendants upon the claim that said defendants at separate and distinct times and places committed separate and distinct individual assaults and batteries upon said plaintiff.

"(16) It does not appear from the allegations contained in said fourth count that there is any joint liability of said defendants on account of the various assaults and batteries alleged in said fourth count to have been committed upon said plaintiff.

"(17) The fifth count does not state a cause of action against all or any of said defendants for the reason that it does not charge that said plaintiff was acquitted of or from the offense alleged therein to have been charged against him.

"(18) It appears from the allegations contained in the third count of said declaration that said plaintiff did agree in writing to withdraw the complaint alleged to have been made against said defendant Louis C. Hall, Jr., and also agreed that neither he nor his said daughter would give evidence in said cause against said Louis C. Hall, Jr., and said plaintiff is not permitted to ask for or recover any damages, as claimed in the fifth count of said declaration, growing out of said transaction, for the reason that it appears that said plaintiff entered into an illegal agreement to suppress a legal investigation and prosecution concerning an alleged criminal offense and the imposition of due punishment therefor, if such offense had been committed, and was therefore a party to an illegal agreement, and cannot base any right to recover upon the results of said illegal agreement, as stated in said fifth count."

The first three grounds of demurrer may be considered together. It is claimed that the wrongs complained of in this count do not appear to be the joint act of all of the defendants. We think, that, where A., B., and C. are charged with having made an assault, it sufficiently appears to be a joint act. Certainty to a certain intent in general, or what upon a fair and reasonable construction may be called certain, is all that is required. We think that it sufficiently appears that the acts complained of were the joint acts of all of the defendants. What the evidence may show to have been the facts we are not here concerned with.

2. The fourth and fifth grounds will be considered together. They are based upon the claim that the charge that the defendant Louis C. Hall, Jr., debauched the daughter of the plaintiff constitutes a

separate count. In this we cannot agree with counsel for the defendants, for the reasons already stated.

The sixth to thirteenth grounds of demurrer, inclusive, treat what we think is the second count as the third count of the declaration. It is urged that the allegations are too vague, uncertain, and informal to constitute a cause of action. In our opinion, a just criticism of this count would be that it is argumentative and sets up the evidence instead of stating the ultimate facts, in many instances. In our opinion, the count states a cause of action. All the torts leading to one damage or object may be joined in one count.

In *Antcliff v. June*, 81 Mich. 477 (45 N. W. 1019, 10 L. R. A. 621, 21 Am. St. Rep. 533), it was said:

"For every malicious wrong there is certainly in this day and age a remedy; and, under our liberal system of pleading in this State, a plain and clear statement of the facts constituting the wrong is sufficient, and it is but little matter, in actions of trespass on the case, what the action is named or called."

See *Marlatte v. Weickgenant*, 147 Mich. 266-274 (110 N. W. 1061).

We recognize the rule stated by counsel for defendants, and well expressed in *Walkier v. Weber*, 142 Mich. 322, 325 (105 N. W. 772, 773), that:

"It has been uniformly held that, where money has been paid or goods delivered in pursuance of a contract that is immoral or criminal, or in violation of a statutory provision, and the parties are in *pari delicto* and *particeps criminis*, the court will leave them where they have placed themselves."

The pertinent question here involved is whether that rule should be applied in view of the allegations of the second count, to which we invite attention. We are of opinion that the rule contended for does not apply where one party by fraud, deception, and overreach-

ing has induced another party to do some unlawful act, which he would not have done if he had not been misled, or deceived and defrauded into perpetrating it. The correct rule is stated in 20 Cyc. p. 80, as follows:

"A party who has been fraudulently misled cannot recover where he must found his claim in his own violation of a criminal statute. But where the fraudulent misrepresentations are intended to create, and actually do create, in his mind a belief that, under the circumstances represented, the act which he is induced to do is neither illegal nor immoral, he may recover the damages he has sustained notwithstanding a statute makes the act a criminal offense."

See English and American cases cited in note. See, also, 2 Cooley on Torts (3d Ed.), pp. 965, 984.

It is also urged that, if plaintiff ever had a cause of action because of the debauching of his infant daughter, he has not lost it by reason of anything stated in said count. Because plaintiff claims too much in his allegation of damages is not ground of demurrer. We think the count states a cause of action against all the defendants.

3. The criticisms of the third count (called the fourth count in the demurrer) have been disposed of in what we have said of the first count.

4. We think the fourth count states a cause of action against all of the defendants. Whether the evidence will sustain the count is a question we need not here consider.

We have considered all of the other questions raised and find no error. We therefore are of the opinion that the order overruling the demurrer should be affirmed.

KUHN, OSTRANDER, BIRD, MOORE, STEERE, BROOKE, and PERSON, JJ., concurred.

GORDON v. DRAKE.**1. APPEAL AND ERROR—NEW TRIAL—SAVING QUESTIONS FOR REVIEW.**

Where the trial court denied the motion for a new trial without filing his reasons therefor, and no request was made to give them, his action in denying the motion cannot be reviewed in this court.

2. ADMIRALTY—JURISDICTION—LOCALITY—TORTS.

In cases of tort, the test by which to determine whether the wrongful act is one of admiralty cognizance, is locality.

3. SAME.

Where the tort originates upon the water, but is consummated upon the land, it is not within the admiralty jurisdiction.

4. SAME—CIRCUIT COURTS.

So, where plaintiff was injured by being crushed between the pier and a launch on which he was a passenger, while jumping ashore at the command of the master of the boat, the circuit court, and not the Federal court, had jurisdiction of the action for damages against the owners of the launch.

5. MASTER AND SERVANT—NEGLIGENCE—TRIAL—QUESTION FOR JURY.

Where the question before the court was whether the act complained of was an act of negligence of the master of the launch for which defendants were liable, or was an error of judgment in a case of emergency, it was proper to submit it to the jury for determination. KUHN, OSTRANDER, and BROOKE, JJ., dissenting.

6. SAME—NEGLIGENCE—INCOMPETENT SERVANT—PERSONAL INJURIES—NOTICE—TRIAL.

Where there was no evidence that the master had knowledge or notice of the servant's claimed incompetency, or anything that was sufficient to put him upon inquiry, the court did not err in taking that question from the jury.

Error to Berrien; Bridgman, J. Submitted June 8, 1916. (Docket No. 6.) Decided September 26, 1916.

Case by Harry Gordon against Logan J. Drake and another for personal injuries. Judgment for plaintiff. Defendants bring error. Affirmed.

O'Hara & O'Hara, for appellants.

Cady & Andrews, for appellee.

STONE, C. J. This is an action on the case brought to recover damages for an injury sustained by the plaintiff by reason of the alleged negligence of the employee of the defendants. At the time of the injury complained of the defendants were the owners of a gasoline launch known as the Wolverine, with which they were engaged in the transportation of passengers between the dock in St. Joseph and Pottawattamie Park on Lake Michigan, north of St. Joseph about eight miles. The boat was about 46 feet in length, with a beam of 9½ feet. One man operated the boat. The boat on this occasion was in charge of one Porter as master, who was duly licensed. On July 14, 1913, at about 6 o'clock p. m., plaintiff paid the fare and took passage in this boat to be carried to the harbor at St. Joseph. Ordinarily it took 50 minutes to an hour to make this run. The plaintiff was the only passenger on this trip, and there were but the two persons named in the boat. When the boat left Pottawattamie Park the sun was shining, and there was nothing to indicate a storm. A storm, called by the witnesses a "squall," struck the boat when it was about five miles from Pottawattamie Park, and about three miles from St. Joseph Harbor. The master, in his testimony, described the storm as follows:

"It was wind and rain, and the rain was so heavy you couldn't see anything, you couldn't see 20 feet from you, and it would take—the wind was so strong it would take the water, what little sea there was, and blow it right into the boat. * * *

"Q. How sudden did that come upon you in time, from the time you first noticed a disturbance in the atmosphere until the storm had reached you?

"A. Not over ten minutes."

He described the wind as a northwest wind, and that he was going a little west of south, as the outer end of the pier at St. Joseph was about 2,000 feet from the shore. About three-quarters of an hour after leaving Pottawattamie Park, the master discovered that he was abreast of the Edgewater Clubhouse pier, which was about 2,000 feet north of the St. Joseph pier, and he tried to get out into the lake from the pier. The pier at the Edgewater Clubhouse extended out into the water some 400 feet. The master claimed, in his testimony, that when he discovered he was 40 or 50 feet from the Edgewater Clubhouse pier he tried to turn to go out into the lake and away from the pier, but that the engine began to fail him, and that he could not steer the boat, and that finally the engine stopped, and the wind blew the boat against the Edgewater Clubhouse pier. There was at the trial a sharp conflict in the evidence as to whether the master shut off the power when near the Edgewater Clubhouse pier, or whether the engine failed to operate at that point. It was testified to by the plaintiff that the master shut off the power as the boat came up to the pier. His testimony upon that point was as follows:

"Q. When he discovered the light what did he do?

"A. He pulled in quite a way, and he had to come around to make the turn in order to come out past the edge of the pier. It seems he miscalculated the steering gear, and he struck the end of the pier, which tore off part of the canopy.

"Q. What occurred then?

"A. As soon as he struck it, he shut off his engine, threw up the trapdoor, little door on top, and got up on the pier, and he said 'Jump!'

"Q. Where was he when he told you to jump?

"A. He was on top, one foot on the pier and one foot on the canopy.

"Q. Was the engine going up to that time?

"A. Until the time he—just before, up until the time he struck the pier, he shut his engine off.

"Q. Did you attempt to make a landing then at his command.

"A. When he told me to jump, I jumped for the pier. I had to jump up, and I grabbed a post on the pier—I believe it was a post or board; I don't remember which now.

"Q. What occurred then?

"A. I hung on. The waves kept dashing the canopy of the boat up against the pier, and I was in between the two; I was used as a pad, and he tried to help me up. And I hung on, and finally I told him: 'You can't do any good there; get on the other side of the fence (I believe they have a railing there); that way you may be able to help me, but you cannot do any good there.' And he got on the other side and got hold of my arm. I managed to get one leg on the floor of the platform, and when I got up there, this side of the fence, he started on down to the clubhouse. I got across the fence and started after him.

"Q. Did he take any tow line ashore with him?

"A. No, sir.

"Q. Did he make any effort to fasten the boat to the pier?

"A. No, sir.

"Q. What did he do with the boat?

"A. He just left the boat at the mercy of the gale."

The negligence claimed in the declaration was that the defendants put in charge of said boat an inefficient, incompetent, and inexperienced pilot. And, further, that the said pilot or master conducted himself so carelessly, negligently, and unskillfully in the control and management of said boat that by and through his carelessness and negligence in managing and operating the sail boat, and for want of due care, he misdirected and misguided said boat, so that it collided with and against the pier in front of the Edgewater Clubhouse,

and that said pilot became frightened, and then and there negligently jumped to the pier and abandoned the boat and the plaintiff therein, and ordered the plaintiff to jump therefrom to the said pier. And it was the claim that, while the plaintiff was acting in obedience to the orders and command of the said pilot the said plaintiff was violently thrown against said pier with great force, and crushed between the said boat and pier by means whereof the plaintiff was greatly hurt, injured, bruised, and wounded. There was evidence tending to support these allegations.

The trial court, in submitting the case to the jury, took from their consideration the question of the incompetency of the master or pilot. Upon that subject he charged the jury as follows:

"And I instruct you, as requested, that there is no evidence in this case that will warrant you in finding defendants negligent, simply because they employed Porter to operate this boat. It is possible, however, for a competent man to be guilty of negligence, but negligence is never presumed, but always must be proved. Having placed Mr. Porter in charge of the launch the defendants would be responsible for negligence, if any, on his part. Negligence is the failure to do what a person of ordinary care and prudence would have done under the circumstances and the situation, or doing what such person under the existing circumstances would have done. The duty is indicated and measured by the exigencies of the occasion. The master of the launch need not be of the highest skill and attainments in his profession, and need possess only the ordinary and usual requirements of those in like position; and, because any results might show that some other course would have been preferable, there would be no liability for negligence, though he had made a mistake, if at the time, under the circumstances, he acted with such ordinary care and prudence as is usually exercised by persons in like position. Ordinary care depends upon the circumstances of each particular case, and such care as a person of

ordinary prudence and skill would usually exercise under the same or similar circumstances."

The plaintiff recovered a verdict and judgment of \$500.

There was a motion for a new trial, which was denied, but no reasons were filed in writing by the circuit judge in denying the motion, and there is nothing in the record to indicate that he was requested to give his reasons. We cannot therefore review his action upon the motion for a new trial. *Griffin v. McKnight*, 116 Mich. 468 (74 N. W. 650) ; *McRae v. Lumber Co.*, 102 Mich. 488 (60 N. W. 967).

The defendants have brought the case here, alleging error.

It is the contention of defendants' counsel:

(1) That if the plaintiff ever had a cause of action against the defendants, it should have been litigated in the courts of admiralty. This question was raised by defendants in their motion to direct a verdict on the conclusion of the testimony.

(2) It is the claim of the defendants that there was no evidence of negligence on the part of the defendants or their employee Porter. This question was also raised by motion to direct a verdict, and by requests to charge, which were refused.

1. The first question to be determined is whether, under the facts above stated, this was a maritime tort over which the Federal courts alone have jurisdiction. Locality, by all the authorities, is the test in cases of tort by which to determine whether the wrongful act is one of admiralty cognizance. Where the active cause of the injury originates upon navigable waters, and the tort is consummated upon land, admiralty has no jurisdiction. 1 Cyc. p. 843, and cases cited. Personal injuries received on shore, although caused by negligence originating on a ship, are not within the jurisdiction of admiralty. *Price v. Belle of the Coast*

(D. C.), 66 Fed. 62; *The Mary Garrett* (D. C.), 63 Fed. 1009; *The H. S. Pickands* (D. C.), 42 Fed. 239; *The Mary Stewart* (D. C.), 10 Fed. 137; *Billings v. Breinig*, 45 Mich. 65 (7 N. W. 722).

"The test of jurisdiction in tort is the locality, not the nature of the act. The tort complained of must have occurred on water to be within the admiralty jurisdiction, so where it arises upon the water, but is consummated upon the land, it is not within the admiralty jurisdiction." 1 Am. & Eng. Enc. Law (2d Ed.), p. 656, and cases cited in note.

In *The Mary Stewart*, *supra*, it was held that an injury done to a person while standing on the wharf, by a bail of cotton which fell upon him from a ship's tackle alongside, cannot be redressed in admiralty. In *The H. S. Pickands*, *supra*, the libelant, who was engaged in repairing a vessel which lay at a wharf, attempted to descend a ladder connecting the wharf with the bulwark of the vessel. The ladder had been protected against slipping by a cleat at the bottom, but had been removed from the protection of the cleat by the negligent act of the master. In descending the ladder, it slipped, and libelant was thrown upon the wharf and injured. It was held that a court of admiralty had no jurisdiction. Brown, J., said:

"I am clear in my opinion that a court of admiralty has no jurisdiction in this case. It has never been doubted since the case of *The Plymouth*, 3 Wall. 20, that, to enable us to take cognizance of a maritime tort, the injury must have been consummated, and the damage received, upon the water. The mere fact that the wrongful act was done upon a ship is insufficient. Subsequent adjudications have in no wise tended to limit or qualify this rule."

See, also, *The City of Erie v. Canfield*, 27 Mich. 479; *The John Spry Lumber Co. v. The C. H. Green*, 76 Mich. 320 (43 N. W. 576).

The trend of the authorities seems to be to the effect

that if the injury complained of happened on land, it is not cognizable in admiralty, even though it may have originated on the water. This springs from the well-known principle that there are two essential ingredients to a cause of action, viz., a wrong, and damage resulting from that wrong. Both must concur. To constitute a maritime cause of action, therefore, not only the wrong must originate on water, but the damage—the other necessary ingredient—must also happen on water. The injury in the instant case happened on the land. Docks and wharves are but improvements or extensions of the shore. They are fixed and immovable, and are a mere continuation and part of the real estate to which they are attached, and this is the case whether they project over the water or not. Under the facts of this case and the decisions above referred to, we must hold that the circuit court had jurisdiction.

2. It is the claim of the plaintiff in this court, as it was in the court below, that the master or pilot was inefficient and incompetent; also that he was guilty of negligence in not keeping his boat away from the shore and pier; and, lastly, in shutting off the power and permitting the boat to drift against the pier, and in abandoning the boat and putting the plaintiff in a perilous position, which necessitated his jumping from the boat in order to escape the danger of being left in the deserted boat alone.

We think the circuit judge properly submitted to the jury the question of the claimed negligence of the defendants. It was a fair question for the jury whether this was an error in judgment of a competent man, or whether it was an act of negligence on his part. The distinction between an error of judgment, in case of an emergency, of a competent man, and negligence is clearly pointed out in the case of *Luka v. Lowrie*, 171 Mich. 122 (136 N. W. 1106, 41 L. R. A. [N. S.]

290). As was there said (quoting from *The Tom Lysle* [D. C.], 48 Fed. 690):

"The distinction between an error in judgment and negligence is not easily determined. It would seem, however, that if one, assuming a responsibility as an expert, possesses knowledge of the facts and circumstances connected with the duty he is about to perform, and, bringing to bear all his professional experience and skill, weighs those facts and circumstances, and decides upon a course of action which he faithfully attempts to carry out, then want of success, if due to such course of action, would be due to error of judgment, and not to negligence. But if he omits to inform himself as to the facts and circumstances or does not possess the knowledge, experience, or skill which he professes, then a failure, if caused thereby, would be negligence."

There was no evidence that defendants had knowledge or notice of Porter's claimed incompetency, or of anything that was sufficient to put them upon inquiry, or of any conduct that would have disqualified him for the work he was doing. The court did not err in taking that question from the jury. We think, however, that the question of the claimed negligence of the master in the particulars named was properly submitted to the jury by the trial court.

An examination of the record satisfies us that there was no reversible error therein, and the judgment of the court below is therefore affirmed.

BIRD, MOORE, STEERE, and PERSON, JJ., concurred with STONE, C. J.

BROOKE, J. (*dissenting*). The record in this case discloses that the distance between Pottawattamie Beach and St. Joe Harbor is 8 miles. The boat in which plaintiff was being transported was capable of covering the distance in about one hour. When approximately 5 miles of the distance had been covered,

a sudden squall, accompanied by a heavy rain, developed. It is uncontradicted that the heavy precipitation, accompanied by a clouding of the sun, rendered it impossible for the occupants of the boat to see more than a very few feet ahead of them. The velocity of the wind for a period of ten minutes was between 40 and 50 miles per hour. According to the testimony, not more than ten minutes elapsed between the indications that a squall was coming and its actual breaking. The record further discloses that a line of pound nets was set along the shore between Pottawattamie Beach and St. Joe Harbor at a distance of about 1,000 feet from the shore, and extending out into the lake a like distance. In fair weather it was customary for boats, the size of the one in use on this occasion, to navigate between the shore and the pound nets. In rough or stormy weather they usually proceeded outside said line of nets. There being no indication of bad weather when the trip under consideration was undertaken, the inside passage was chosen. When the storm broke, Porter, the master of the ship, continued on his way, accelerating the speed of his engine to its limit, which was about 9 miles per hour. The wind which came from the northwest had a tendency to drift the boat somewhat toward the shore. The exact amount of the drift it was impossible to determine by reason of the fact that the storm had entirely obscured the shore and all lights.

The Edgewater pier extends out into the lake for a considerable distance near the point where the boat was when the squall struck her. As the master was proceeding to propel his boat in what he believed to be the proper direction, the lights on the Edgewater pier suddenly appeared almost directly in front of him and but a comparatively few feet distant. Both he and the plaintiff agreed that he immediately attempted to turn his boat to the right towards the lake, but was

unable to escape contact with the pier. Porter claims that this contact was due to the fact that his engine "died" upon him, probably because in the storm water had interfered with the proper operation of its mechanism. The plaintiff claims that *after* the boat struck the pier the master tried to clear her, but, being unable to do so, he shut off the engine. In my opinion it is immaterial which narrative accords with the fact. Having struck the pier and being unable to disengage his boat therefrom, Porter climbed out upon the pier and instructed the plaintiff to follow. This the plaintiff did, and was assisted by Porter from the boat to the pier.

The only witness produced by plaintiff to prove negligence on the part of the defendant was the plaintiff himself. On cross-examination he was interrogated as follows:

"Q. What did this man do on that boat that, in your judgment, he had not ought to have done?

"A. I do not think he should; he should have deserted his launch at the time.

"Q. Well, what else; now, you were there?

"A. That would take in the whole question, I believe, when you ask me, What should not he have done? that he deserted his launch. He deserted his launch, and practically left me there at—on the pier, because after I had got up on the pier, and had a hold of the fence, he started running on down the pier.

"Q. He lifted you up on the pier?

"A. He assisted me on the pier on this side of the fence on the side of the lake; he was on the other side of the fence.

"Q. You got across the fence in some way?

"A. I got across the fence in some way.

"Q. Were you hurt in getting across the fence?

"A. No; I was not hurt in getting across the fence; I was hurt before I got across.

"Q. Tell us something in your judgment that indicated that he did that he had not ought to have done; that you consider negligence?

"A. I consider when we were tossed around in the lake, not knowing where he was at, that it should have been in his place—if he had a compass there he could have turned his boat around and run into towards the shore. I can't say that he is negligent in that part in a way. If he had a compass there, why he probably would have known his way to go. * * * He made his turn too short and caught the pier.

"Q. Made what turn too short?

"A. Coming out from around here where I showed you before, where we crossed—where the canopy caught the end of the pier. That was negligence on his part. Had he guided his boat right, he would have missed the pier. * * *

"Q. The fact of the matter is, you didn't see the pier at all until the boat was striking right on the pier. That is true?

"A. No, sir; he was shoving the boat from the pier before we struck it.

"Q. After he got up close to the pier he endeavored to save the boat?

"A. Yes, sir.

"Q. How close to the pier were you before you saw it?

"A. We were almost on top of it."

I am clearly of the opinion that the situation as disclosed by the uncontradicted evidence was one of emergency, where the master of the ship, confronted by one of the perils of navigation, with full knowledge of such facts as could be obtained under the circumstances, exercised his best judgment in the extremity which presented itself, and this is true whether we accept the master's story that the engine "died" upon him or the plaintiff's story that he shut off the power after the boat had struck.

It is not apparent to me that the master was guilty even of an error of judgment in his conduct after the lights suddenly appeared in front of him. The predicament in which he then found himself was due to an error in judgment as to the direction in which he

was steering, caused by the sudden darkness which completely obscured his surroundings.

To the quotation from *The Tom Lysle* (D. C.), 48 Fed. 690, which my Brother STONE presents in his opinion, should be added:

"No one can be charged with carelessness, when he does that which his judgment approves, or where he omits to do that of which he has no time to judge. Such act or omission, if faulty, may be called a mistake, but not carelessness" (citing *Brown v. French*, 104 Pa. 604; *Williams v. Le Bar*, 141 Pa. 149 [21 Atl. 525]).

"It is the elementary principle that when a man acts according to his best judgment in an emergency, * * * he is not chargeable with negligence" (citing *Staloch v. Holm*, 100 Minn. 276 [111 N. W. 264, 9 L. R. A. (N. S.) 712])

—but I am unable to glean from this record that defendants' agent, Porter, when confronted with this emergency, which was not of his own making, acted even injudiciously.

I am of opinion that the judgment should be reversed without a new trial.

OSTRANDER and KUHN, JJ., concurred with BROOKE, J.

PRUSSIA v. BAILEY.

1. TRIAL—CROSS-EXAMINATION — CORRESPONDENCE — PROOF — WITNESSES.

A party to a cause, who offered a copy of a letter in which it was represented that some of defendants' notes were inclosed, might be cross-examined as to whether he actually did inclose them in the envelope.

2. SAME—PAYMENT—EXAMINATION.

In support of a claim of payment, defendant's wife was properly allowed to testify where the money used in payment came from and to refresh her recollection by referring to a book of account.

3. EVIDENCE—HEARSAY—CORRESPONDENCE—LETTERS.

The trial court was also justified in excluding an explanation given in one of the said letters why the plaintiff returned the papers, on the ground that it was self-serving.

4. SAME—DIRECTING VERDICT.

Evidence, in an action on a certain note that defendant claimed had been paid, considered and *held*, to justify the court in submitting the issue of payment to the jury.

5. SAME.

The claim of plaintiff being that the contract on which plaintiff's notes were based was invalid on the ground that it was entered into on Sunday, the court did not err in refusing to permit a witness to testify where plaintiff was on Monday morning, following the date in controversy.

6. AMENDMENT—TRIAL—PLEA AND NOTICE.

When the amendment of a notice of payment was unnecessary the court did not commit reversible error in allowing defendant to correct it.

Error to Shiawassee; Miner, J. Submitted June 13, 1916. (Docket No. 56.) Decided September 26, 1916.

Assumpsit by Franklin O. Prussia against Orla Bailey and another on a promissory note. Judgment for defendants. Plaintiff brings error. Affirmed.

A. L. Chandler and E. F. Wilson, for appellant.

Francis J. Shields (Leon F. Miner, of counsel), for appellees.

STONE, C. J. This is an action of assumpsit, the declaration being upon the common counts, to which was attached under the usual notice a copy of a promissory note reading as follows:

"\$500.00 DETROIT, MICH., June 1, 1910.
"Seven months after date we promise to pay to Ruth E. Benjamin or order five hundred dollars at ———, value received, with 5 per cent. interest per annum from above date.

"ORLA BAILEY,
"ROBERT BAILEY."

Indorsed on back of note the following:

"Ruth E. Benjamin, May 5, 1911, received interest on this note to date.

"FRANKLIN O. PRUSSIA."

Under the plea of the general issue the defendants gave notice of payment of the note "set forth in plaintiff's declaration"; also the following:

"This notice is given for the purpose of pleading payment in full of all amounts claimed in the declaration to be due plaintiff from defendants, or either of them, all of which statements and averments in the notice contained defendants and each of them will prove as a part of their, and each of their, defenses at the trial of said cause."

It is undisputed that the note above set forth is one of a number of notes given in the purchase of a farm from Mrs. Benjamin, who was the mother of the plaintiff, and that on May 1, 1911, there remained unpaid and due two notes of \$500 each, signed by both defendants, one note of \$64 also signed by both defendants, and one note of \$61 signed by defendant Orla Bailey alone, and that the plaintiff was the holder of

said notes, upon which notes there was interest due. It is also undisputed that defendant Orla Bailey had arranged to meet the plaintiff in Detroit, where the latter resided, on Sunday, May 7, 1911, for the purpose of paying some interest on said notes, and exchanging for the \$500 note sued upon two notes, one for \$200 and one for \$300, payable eight months after date, with interest at 6 per cent. per annum.

The trial of the case took an unusual course for a simple suit upon a promissory note. Instead of introducing the note in evidence and resting, the plaintiff gave evidence tending to show that an agreement had been made with defendant Orla Bailey by which the plaintiff was to surrender the note sued upon for the two smaller notes, to wit, one for \$200 signed by Orla Bailey, and one for \$300, signed by both defendants; also that the two notes of \$61 and \$64, respectively, had been paid, and \$100 paid and indorsed on the other \$500 note, and all interest settled, leaving \$900 unpaid upon the farm deal, but that such agreement had been made on Sunday, May 7, 1911, and was therefore void, and that he had returned the \$200 and \$300 notes to defendant Orla Bailey, and that he was entitled to recover upon the note sued upon.

Upon the cross-examination of the plaintiff the following receipt given by him to said defendant Orla Bailey was received in evidence without objection, viz.:

“DETROIT, MICH., May 8, 1911.

“Received of O. A. Bailey one eight months’ promissory note dated May 5, 1911, and due January 5, 1912, for three hundred dollars no hundredths (in figures and dollar sign) interest, six per cent. from May 5, 1911, one signed by O. A. Bailey and Robert Bailey jointly. Received one note dated May 8, 1911, for two hundred dollars (\$200) no one-hundredths, due January 8, 1912, interest six per cent. from May 8, 1911, and signed by O. A. Bailey. These notes given to take up a certain five hundred dollar no one-hundredths dollars note that I have of Robert Bailey and

O. A. Bailey made June 1, 1910. Received this date one hundred eighty-eight thirty-two one-hundredths dollars to apply on account of O. A. Bailey and Robert Bailey, but not to apply on the above specified notes.

"FRANKLIN O. PRUSSIA."

It was the claim of the plaintiff that the reason the two small notes and the \$500 note sued upon were not surrendered to Orla Bailey at the time was that they were in the bank at Detroit. It was the further claim of the plaintiff that on May 26, 1911, he returned the \$200 and \$300 notes to the defendant Orla Bailey in a registered letter, a carbon copy of which was offered in evidence, the said defendant not being able to produce the original, and in fact claiming that he had not received such a letter. The carbon copy of the letter was finally received in evidence, except that part which was embraced in the parentheses, which was excluded because self-serving and immaterial, the plaintiff excepting to such ruling. The entire of said letter was as follows:

"May 26, 1911.

"MR. ORLA BAILEY,

"Byron, Mich.

"Dear Sir:

"I presume that you think I have forgotten all about you, or the forwarding of the notes, but I assure you that such is not the case. As I told you the night that you were here, that the notes were locked up in a vault down town and since that time it has been impossible for me to get down town during banking hours, so that I could get same from the vault. I am inclosing herewith the two small notes, that is, the joint note of you and your father for sixty-four dollars which was due February 1st; also the note for sixty-one dollars given by you which was due February 1st. Then you will find the two hundred and three hundred dollar notes that you gave me the night that you were here. (The reason that I am returning the last two notes to you is this: I have been thinking over the matter, and I could not quite understand why I should take

your note for \$200.00 without any security, when your father objected to signing same. Now, don't misunderstand me, because I believe you are strictly honest and upright, but I am in a rather peculiar position. My means are limited. The property that you bought was bought jointly and if anything should happen to you I might have a pretty hard time to collect the \$200.00 note. I can't understand why your father would object to making new notes at this time to cover less amount than he first signed for. Furthermore, personal notes without an indorser are very hard to convert into money, if I should ever be pressed for same. You know a good many people who are well to do that live near where you do that undoubtedly would be glad to sign the \$200.00 note providing your father would not, or possibly they would be willing to loan you the money. You and Mr. Luther C. Kanouse are very good friends, and I would be willing to accept Mr. Kanouse as an indorser on your note.)

"I hope that my decision in this matter will not cause you any annoyance, as I have not intended to do so, but I believe that you will see the position that I am placed in regarding this matter. You can tell your father that I have credited one of the notes with one hundred dollars payment on the same, and also credited both of them with the interest up to the date you were here. That leaves a balance of nine hundred dollars due me, besides what interest that may accrue from the time you were here until they are paid. You said that you expected within thirty days from the time I saw you to pay some more on these notes, and I trust that you will be able to do so, as I wish to get this matter cleared up as fast as possible. In fact, when you gave me these notes, if you remember, you expected to have them all taken up by February 1st last, and I had planned upon this money to use, so that I have been inconvenienced quite a little by not getting same, as money cannot be borrowed as readily here as in a small place or in the country. Please let me hear from you at your earliest convenience, and make another payment as soon as possible. With kindest personal regards, I beg to remain,

"Yours truly,

"FRANKLIN O. PRUSSIA.

"(P. S.—I also inclose 9.68 refund as per agreement on check.)"

The plaintiff not only testified that no part of the \$500 note sued upon had ever been paid, but he also testified as follows in answer to the following question by his counsel:

"Q. After you returned these notes to Mr. Bailey in the letter which you have spoken of, and those that were shown you, has he ever returned those notes to you, or any payment on them, in any way?

"A. No, sir."

On the part of the defendants it was claimed, and they gave evidence tending to support the claim, that the meeting between plaintiff and Orla Bailey in Detroit occurred after midnight Sunday night, that plaintiff was in Ann Arbor, and absent from Detroit until nearly midnight, and that the business between them was all transacted after midnight and on the 8th day of May, and that the receipt was properly dated on May 8, 1911, or on Monday, and that there was no truth in the claim that it was a Sunday contract. Defendants also denied that the \$200 and \$300 notes were returned to defendant Orla Bailey in the claimed letter of May 26, 1911, but claimed that the carbon copy was a subterfuge, in so far as the notes were concerned.

Both of the defendants, and the wife of defendant Orla Bailey, testified positively and circumstantially to the payment to the plaintiff of the \$200 and \$300 notes, with interest, amounting in all to \$523, in the spring of 1912 at the house of defendant Orla Bailey, and that the plaintiff at the time produced and surrendered said notes; that defendant Robert Bailey objected to payment being made until the \$500 note here sued upon was surrendered, but that plaintiff said it was covered by the said receipt. There were therefore two sharply contested questions of fact presented to the jury, viz.: Did the exchange of notes at Detroit

occur on Sunday, and were the \$200 and \$300 notes paid? These questions were fully and properly presented to the jury in a clear charge, in which we find no error.

The trial resulted in a verdict and judgment for the defendants, and the plaintiff, without moving for a new trial, has brought the case here upon writ of error. By 50 assignments of error the plaintiff complains of divers rulings of the court in the reception of evidence and in the charge. We have examined all of the assignments of error, but find it necessary to specifically refer to the following only:

The first assignment of error relates to the cross-examination of the plaintiff as to whether or not he inclosed the \$200 and \$300 notes in the envelope, and the following occurred:

"Q. Did you inclose anything else in that letter?

"A. I don't remember.

"Q. I am asking you for your recollection. Do you know whether you did or not?

"A. I told you I think so, but—

"*Mr. Chandler*: I think the letter would be the best evidence.

"*The Court*: He is not asking for the contents of the letter. He is asking what he did.

"*Mr. Chandler*: Then I will make the objection he is entitled to see the letter before he is cross-examined upon it.

"*The Court*: He may answer.

"Exception."

We think the defendants were entitled, under the circumstances, to inquire of the plaintiff what he did at the time of mailing the letter, and that it was not necessary before doing so to show plaintiff the letter. The important question was whether the notes were actually inclosed in that letter, as claimed by the plaintiff.

The wife of defendant Orla Bailey was permitted to

testify where the money came from that was used to pay the two notes in the spring of 1912, and was permitted to refresh her recollection by reference to an account book. The book was not put in evidence. The issue was a sharp one, and we think that the evidence was admissible as bearing upon the probabilities. See cases cited in *Neal v. Neal*, 181 Mich. 114-128 (147 N. W. 624).

Error is assigned upon the refusal of the court to receive in evidence the entire letter of plaintiff of May 26, 1911, above set forth. The vital part of the letter, to wit, that he inclosed the \$200 and \$300 notes, was received in evidence. The self-serving statements why he returned the notes were excluded, and we do not think that the ruling constituted reversible error. It is significant that the reason there stated was not the reason he gave at the trial.

Error is assigned because of the following ruling in the direct examination of the witness Lamont as to where the plaintiff was on May 8, 1911:

"Q. Do you know where Mr. Franklin O. Prussia was on the 8th day of May, 1911?

"*Mr. Shields*: I object to it as incompetent, immaterial, and irrelevant.

"*The Court*: Objection sustained.

"Exception.

"*Mr. Chandler*: If your honor please, that is when this paper is claimed to have been dated.

"*The Court*: Anything that occurred, if he knows anything about who was with him at the time these papers were executed, he may answer. You are covering a whole day. Confine it to the time they were making that contract and bargain, if this witness knows anything about it."

The plaintiff had already testified that the transaction occurred on Sunday night, May 7th, just before midnight. That was the occasion that was important. Manifestly where the plaintiff was during the day of

Monday, May 8th, was not material. This witness was permitted to testify that Mr. Bailey was not at the factory where plaintiff was employed on May 8th, and that he did not know what time plaintiff reached the factory on that day; that he usually got there by 9 o'clock.

The court permitted the defendants to amend their notice under the general issue by claiming payment of the \$200 and \$300 notes.

The plaintiff having testified that those notes had never been paid, in whole or part, we think that an amendment of the notice was not necessary, but no error was committed in permitting the amendment. A careful reading of the entire record satisfies us that the important and controlling questions involved were questions of fact, which were properly submitted to the jury, which found that the note sued upon had been paid and satisfied, and that there is no reversible error in the record.

The judgment below is therefore affirmed.

KUHN, OSTRANDER, BIRD, MOORE, STEERE, BROOKE, and PERSON, JJ., concurred.

SYKES v. VILLAGE OF PORTLAND.**1. ELECTRICITY—MUNICIPAL CORPORATIONS—NEGLIGENCE.**

Plaintiff brought case against the village of Portland and the Citizens' Telephone Company for injuries received by her in attempting to rescue her infant son, less than ten years of age, from contact with a live wire. Defendant village operated a plant for lighting used for municipal electrical service, both public and private. Plaintiff charged lack of support and insecure fastening of the telephone wire, and lack of proper guards or insulation, and that the telephone wires during a storm sagged and came in contact with the heavily charged wires of the village of Portland, and that one of the wires, which broke off, was allowed to hang down for a long time in a very dangerous condition on a public thoroughfare. *Held*, on a review of the testimony, that the questions of negligence and contributory negligence were for the jury, and the court properly declined to direct a verdict for either defendant.

2. SAME—EVIDENCE—EXPERT AND OPINION TESTIMONY—MODE OF CONSTRUCTION—SAFETY OF METHOD OR POSITION.

The opinion of an expert on the subject that the distance between the wires was dangerous and the wires would not be safe unless placed about 40 inches apart was admissible over the objection that it involved the question for the jury to pass upon.

3. SAME—CHANGES AFTER THE ACCIDENT.

Testimony that after the accident the telephone wires had been fixed so the two could not come together, offered to show that whatever marks appeared on the light wires were made before the injury and to show that the wires were not afterwards affected, *held*, to be proper for the indicated purpose and that it could not be excluded because it was incompetent for another purpose.

4. SAME—EXPERT TESTIMONY—TRIAL.

It was also permissible to show, by the testimony of experienced witnesses, that a person might get a shock sufficient to knock him down without burning him, amplified

by the cross-examination of another witness along similar lines.

5. SAME—EXPERIENCE.

It was, however, erroneous to receive evidence of an inexperienced electrical worker as to his individual experience under dissimilar conditions, since it tended to raise a collateral issue.

6. EVIDENCE—MEDICAL AUTHORITIES—WITNESSES.

The trial court committed reversible error, on cross-examination of one of the medical experts of defendant, in permitting counsel, on interrogating the witness, to show what certain medical authorities claimed and that the question was differently answered by others, as the testimony tended to interject the opinions of persons who were not witnesses in opposition to the opinions of some of the witnesses of defendants, who were charged with negligently maintaining light wires.

Error to Ionia; Davis, J. Submitted June 22, 1916.
(Docket No. 102.) Decided September 26, 1916.

Case by Mary A. Sykes against the village of Portland and the Citizens' Telephone Company for personal injuries. Judgment for plaintiff. Defendants bring error. Reversed.

T. E. Barkworth and *Richard Price*, for appellant village of Portland.

R. A. Hawley, for appellant telephone company.

Ellis & Ellis and *E. M. Davis*, for appellee.

STONE, C. J. The plaintiff, a married woman, brings this action to recover damages against both defendants by reason of an injury which she claims she received on April 21, 1909, at the village of Portland by an electric shock which she received in trying to rescue her son, John Sykes, Jr., a boy between nine and ten years of age, from contact with a fallen village electric light wire which caused the boy's death.

Since the trial of the instant case, a former case, involving damages under the death act (3 Comp. Laws, § 10427 [3 Comp. Laws 1915, § 14577]) for the death of the son, and arising out of the same general facts, has been determined by this court, namely, *Sykes v. Village of Portland*, 177 Mich. 290 (143 N. W. 326). While many of the questions involved in this record are different from those raised and determined in that case, yet a reference to that case will aid in an understanding of this case.

The defendant the village of Portland, in Ionia county, has since 1896 maintained and operated an electric lighting plant, which is used not only for municipal lighting, but also furnishes lights to the inhabitants who desire to buy the same from the village. Prior to 1902 it had erected its wires along Brush street, an east and west street in said village. Crossing Brush street at substantially right angles are Kearney and Grant streets, and midway between these two streets an alley runs north from Brush street. About 50 feet east of the east line of this alley the village had a pole from which electric light wires were extended from the lights on Brush street to a pole on the west side of the alley, about 79 feet north of the north line of Brush street. This latter pole contained a transformer, or step-down, which lessened the current for use at two houses situated on Grant street respectively northwest and southwest from the transformer. These conditions existed when, in 1902, the Citizens' Telephone Company (the other defendant herein) was granted a franchise by the village of Portland to erect its poles and maintain them with necessary wires, etc., for an electric telephone system. Subsequently the said telephone company erected poles on the streets and alleys of Portland, including a line running north and south on the alley in question, also a line running diagonally across Brush street, and to a point in the

alley about 62 feet north of the north line of Brush street. The relative situation of the poles and wires at the time of the accident which formed the basis of this action is shown by the diagram appearing in the opinion in the case in 177 Mich., above referred to.

On the 21st day of April, 1909, plaintiff's said son was passing along Brush street, and in some manner came in contact with the fallen village electric light wire which ordinarily passed from the pole about 50 feet east of the alley on Brush street to the transformer pole on the west side of the alley. As a result of this contact the boy was killed. The immediate cause of the condition of the wire is stated in the declaration in the instant case as follows:

"That afterward, to wit, on the 21st day of April, 1909, while said poles of the Citizens' Telephone Company were so insecurely fastened, and were without support, or guy wires or otherwise, and when its uninsulated wires were sagging and in close proximity to the highly charged, poorly insulated electrical wires of the village of Portland, and when no guards of any kind had been provided by either of the said defendants to keep said wires from coming in contact with each other, and when the said wires of the village of Portland so uninsulated and heavily charged with electricity were running diagonally across said alley west of the property owned by the said Flowers in the village of Portland, close to and underneath the wires of the Citizens' Telephone Company, and while a strong wind was blowing, causing the said corner pole of the said Citizens' Telephone Company to sway, and its wires to sag and strike said heavily charged electrical wires of the village of Portland, where its wires were uninsulated, and where they crossed said alley between Kearney and Grant streets, at a point north of Brush street, and by reason of said contact, or weakness of the said heavily charged electrical wires of the village of Portland, caused by previous contact with the said Citizens' Telephone Company's wires, one of said heavily charged wires of the village of Portland burnt off or broke off, and fell to the ground, and by reason of

such falling hung from the aforesaid pole of the village of Portland standing on Brush street, to which one end of said wire was joined to the pole, and the free broken end extended across a portion of the ground, the part of the street used as a sidewalk, and across the path of pedestrians who walked along the north side of Brush street, and said wire hung then and there for a long time from said pole charged in a dangerous and unsafe manner, to wit, charged with 2,000 volts."

No one saw the boy at the time he came in contact with the wire. When found he was in a little path about six feet from the electric light pole on Brush street, from whence the wires led to the transformer pole. There was no sidewalk on the street at that point, but a worn foot path where people passed between the pole and the lot line. The accident occurred about 4 o'clock in the afternoon. The averments of the declaration as to the immediate circumstances attending the injury, the conduct of the plaintiff, and the consequences following, are set forth as follows:

"That when the said John Sykes, Jr., came in contact with the said wire, he fell to the ground upon his back, with said wire lying across his hand, his feet resting in the path, or sidewalk so called, and his head and body extending to the southwest, and while he was in this position, the plaintiff in this case, who is the mother of the said John Sykes, Jr., was notified that her son was lying on the ground and burning up; that at that time she was at her home, which was from six to eight rods from the place where the boy lay; that she ran from the house in great haste and excitement, and discovered him lying, as above indicated, on his back on the north side of Brush street in the village of Portland; that she feared for his life; that while he was so lying on his back, his eyes and mouth moving, a fire was apparently burning in his hand, and he was apparently alive, and she thought the boy was still alive, and that he was unable to get up; that she believed that she could save the boy's life; that she then and there grabbed him, asked him to get

up, and tried to pull him away from the position he was then in; that she did not then know or appreciate that it was dangerous or unsafe to touch his body, and did not appreciate his real condition; that when the plaintiff came in contact with the electrically charged body of her son, by seizing him with her hands, she received a powerful shock, so that she was knocked to the ground with great force, and fell backwards, dragging the boy with her; that just what plaintiff then did she does not know, for, by reason of the shock and fall, she did not recover her senses for, to wit, three days, and she has no recollection of the boy's funeral or burial; that plaintiff in some manner got the body of her son, the said John Sykes, Jr., away from the contact with the said wire, and that in so doing she was so shocked and injured that she has never recovered therefrom; that by reason of the shock and fall she so received, which she alleges was occasioned by the carelessness and negligence of the defendants as set forth in this declaration, and without fault on her part, she was permanently injured in her spine, chest, right arm, right limb, stomach, lungs, and bowels, and that her right arm has been useless, and she has been growing worse from the time of said shock to the present time, all of which was occasioned by the carelessness and negligence of the said defendants, and while she was attempting to save the life of her son, so occasioned by the negligence as aforesaid; that the plaintiff has lost her health and suffered great pain, and become, by reason of the electric shock and fall occasioned thereby at the time aforesaid, a permanent cripple, and will for the balance of her life have to be, and will remain a cripple and an invalid, without any enjoyment of her life; that before the time of the death of the said John Sykes, Jr., above set forth, and the injury to herself, as stated herein, this plaintiff was a strong and healthy woman, and had not suffered from any complaint or weakness, except that during her life, since puberty, occasionally at the season of her monthly periods, she would have what was called rush of blood to the head, which would occasionally cause dizziness or fainting, but she would immediately on commencing to flow be all right and able to discharge all her duties and exercise all the

functions of her body and mind; that this trouble was not constant and never occurred during pregnancy, or while she was nursing children, and it never caused her more than temporary inconvenience, and that at the time of the injury complained of in this case, and for more than a year prior thereto, the plaintiff had no weakness, except what was occasioned by her age, which was then about 44 years, and being then passing through what is called a 'change of life'; that she had always been able to perform housework and other manual labor, and was a strong, healthy woman, and had no ailments, except the ailments above referred to, which she reasonably expected would, in time, pass away and leave her, as she always had been, a strong, able-bodied woman in good health, strong limbs, upright carriage, and possessed of all her powers, except as herein stated."

Upon the issue framed on this declaration there was a great volume of testimony upon the trial, the case presenting a printed record of more than 650 pages. There was a sharp conflict in the evidence, and nearly every claim made by the plaintiff was strenuously controverted by the defendants, not only upon the facts, but also upon the expert testimony of which there was a great volume. The case was submitted to a jury in a lengthy charge, and the trial resulted in a verdict and judgment for the plaintiff against both defendants in the sum of \$6,000 damages.

There was no motion for a new trial, but the case is here upon writ of error on behalf of both defendants who have assigned, severally, many errors. The case was presented to this court upon briefs. On behalf of the defendant Citizens' Telephone Company it was said that the several questions raised by the assignments of error naturally arrange themselves in groups as follows:

- (1) Expert testimony as to safety of defendant's wires.
- (2) Subsequent change of wires in alley.
- (3) Opinion evidence as to effect of electric shock.

(4) Cross-examination as to contents of medical works.

(5) Permitting Dr. Allen to rebut diagnosis of defendant's physicians.

(6) Impertinent cross-examination by plaintiff's counsel.

(7) Admission in evidence of Exhibit 14.

(8) Should the court have directed a verdict for the telephone company?

(9) Court's charge as to separate liabilities of telephone company.

(10) Nature of plaintiff's ailment.

(11) Duty of defendants.

(12) Plaintiff's contributory negligence.

(13) Charge of court as to plaintiff's previous condition of health.

(14) Measure of damages.

We will consider the questions in the order stated.

1. Expert testimony as to safety of defendant's wires.

Upon the trial plaintiff's witness Hicks was asked the following questions by plaintiff's counsel, and made the following answers:

"Q. Assuming what I have stated concerning the position of these wires, and that they run as indicated as to the distance apart they are, where they cross in the alley, and that they ran as stated or shown on the map or model there, what can you say whether or not that is a safe construction?

"Mr. Hawley: Object to it as incompetent for the reason already stated.

"Q. Is it reasonably safe construction?

"A. No, sir.

"Mr. Hawley: Take exception.

"A. Yes sir. I would say it is not reasonably safe.

"Q. What is the matter with it? Tell the jury.

"A. I understand these are the high tension wires or the primary wires running to the transformer from No. 3 to transformer pole No. 1, carrying the wires 8 to 14 inches of the telephone wires, which is not considered a safe distance. We have never considered it safe to put them that close. This pole No. 2 is not

guyed; so it would have a tendency to pull over from the wind blowing this long spans here. The wires carried from No. 2 to No. 8 is a long spans, and from No. 2 to No. 6 is a long spans, too heavy a spans for this pole to support without guys. I would not consider it properly constructed.

"Q. What change could be made to make it safe?

"Mr. Hawley: Object to it as incompetent and immaterial. * * *

"Mr. Ellis: The question is, What changes necessarily would have to be made to make it safe?

"The Court: He may answer. (Exception.)"

The witness was also permitted to answer the following question over objection and exception:

"Q. Is there any other way that could have been arranged to make it less hazardous than with what is now or was at the time of this accident?"

After the witness had testified that they always figured on keeping electric light wires charged at 2,000 volts placed about 40 inches from the telephone wires, plaintiff's counsel asked him, and he was permitted to answer the following question over defendant's objection and exception:

"Q. Would any nearer location than that be safe?"

The answer was: "No."

It is urged by said defendant that one of the questions which should have been eventually submitted to the jury as a question of fact for its determination was this very question, and that this was a question for the jury to answer, according to their own judgment and without being controlled or influenced in that respect by the judgment of any expert or nonexpert witness, and the following cases are cited: *Harris v. Township of Clinton*, 64 Mich. 447 (31 N. W. 425, 8 Am. St. Rep. 842); *Kelley v. Railroad Co.*, 80 Mich. 237 (45 N. W. 90, 20 Am. St. Rep. 514); *Girard v. City of Kalamazoo*, 92 Mich. 610 (52 N. W. 1021); *Kraatz v. Light Co.*, 82 Mich. 457 (46 N. W. 787);

People v. Plank Road Co., 125 Mich. 366 (84 N. W. 290); *Lindley v. City of Detroit*, 131 Mich. 8 (90 N. W. 665).

We think that an examination of the above-cited cases will show that they are readily distinguished from the instant case. The witness was an expert, and was called and testified as such.

In *N. & M. Friedman Co. v. Assurance Co.*, 133 Mich. 212 (94 N. W. 757), a hypothetical question detailing the method adopted to remodel and improve the interior of a building, and asking if witness thought such construction safe, was held not objectionable as not a proper subject for expert testimony. In that case one ground of the objection was that it was the very question which the jury was to pass upon in the case.

In *Transportation Line v. Hope*, 95 U. S. 297, it was said, concerning a transportation agent:

"The witness was an expert, and was called and testified as such. His knowledge and experience fairly entitled him to that position. It is permitted to ask questions of a witness of this class which cannot be put to ordinary witnesses. It is not an objection, as is assumed, that he was asked a question involving the point to be decided by the jury. As an expert, he could properly aid the jury by such evidence, although it would not be competent to be given by an ordinary witness. It is upon subjects on which the jury are not as well able to judge for themselves as is the witness than an expert as such is expected to testify."

In 2 Joyce on Electric Law, § 1057, it is said:

"But the mere fact that the opinion of an expert may be upon a question which the jury is to decide is not sufficient to exclude the testimony, unless the question is such that the jury would be competent to decide it after having become acquainted with the facts as they existed at the time of the transaction, and the history of the subject to which the question relates."

See, also, *Id.* § 1059; *Nelson v. Lighting & Water Co.*, 75 Conn. 548 (54 Atl. 303).

Most of the cases cited by appellant telephone company relate to highways in which nonexpert witnesses were involved.

An examination of *Kraatz v. Light Co., supra*, will show that hypothetical questions directed to the effect of certain conditions of electric light wires as to the transfer of electricity, are proper.

In *Sykes v. Village of Portland, supra*, in which case a judgment for the plaintiff was affirmed, experts were permitted to testify that a proximity of 14 inches was dangerous proximity.

We are of the opinion that the court did not err in admitting this evidence.

2. Subsequent change of wires in alley.

The testimony showed that on the day in question, and after the accident, employees of the village installed a new wire from pole 1 to pole 3 in place of the broken electric light wire, and that a bracket was nailed or fastened upon telephone pole 2, and that the electric light wires were fastened to it in such a way that they could not come into contact with the telephone wires, or with each other. This testimony was elicited by the following questions asked by plaintiff's counsel of the witness Hale:

"Q. What can you say, witness, as to whether it has been possible for those wires to get together since the day of that accident?

"Mr. Price: What wires?

"Q. The Citizens' Telephone Company's wires and the electric light wires where they cross the alley?

"Mr. Price: Object to it as immaterial and improper, whether it is possible for them to get together since.

"The Court: How is that competent?

"Mr. Ellis: I shall introduce the wires that were taken off from there by the village last spring, and offer to show that the wire had been in contact many times with the Citizens' Telephone Company's wires. I want to show by this evidence they fixed it that day

of the accident in the afternoon, right then and there, they made such a change that it would be impossible after that time for these wires to get together; simply to show that whatever mark was on the electric light wires was made before that time. I do not claim anything about the change; just the same as though I wanted to show for the same purpose, if I had shown by him, he took down that wire that day, and kept it ever since, and therefore there had been no change. The purpose is to show the wire, so far as any wires came in contact with the top of it, was done before that time, and not since.

"The Court: He may answer the question.

"Mr. Price: Exception, and I want to add to my objection the further objection that the witness was not in a position to testify."

The witness then testified to the fastening to bracket. It is urged that the effect of this testimony was to show changes after the accident. We think that the object of this testimony was plainly stated by plaintiff's counsel, and that it was competent for that purpose. We have held that testimony competent for one purpose cannot be excluded because it is incompetent for another purpose. *People v. Doyle*, 21 Mich. 221; *McKenzie v. Vandecar*, 105 Mich. 232 (62 N. W. 1031).

We do not think there was any error in this ruling.

3. Opinion evidence as to effect of electric shock.

It is the claim of the defendants that the testimony showed that there were no indications upon the hands or body of the plaintiff, after the accident, of any contact with an electric wire, or any visible marks of an electric shock, and that, in order to weaken the effect of such condition, plaintiff's counsel, after stating certain alleged facts as to the conditions at the time of the accident, asked the following question of the witness Lamb:

"Q. What I want to know whether a woman taking her where she stopped there—she is reaching for his collar next his face—whether she could have pulled

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him loose from that wire, he lying on the ground in this position, and she runs and grabs him, without burning her hands?"

This was objected to because the question stated pathological conditions that this witness was not competent to answer. This witness was being examined as an expert electrician. The question was finally changed to the following:

"Q. How heavy a shock can you get into the body without having anything show on the outside of the body?"

"*Mr. Hawley*: I don't know as he is an expert on that matter, and object to it as incompetent. * * *

"A. I should say he could get quite a shock—a very unpleasant one. (Exception.)

"Q. Do you know whether a person could get a shock enough to knock him down without being burned?"

"A. Yes, sir; I do know it from actual experience that they could."

This last answer was not excepted to.

Another witness, a Mr. Hicks, also testified as an expert in a similar way, but gave no actual experience.

Later, while Mr. Lamb was on the stand, said defendant's counsel moved to strike out the testimony of both witnesses, as to their judgment whether or not plaintiff would get a shock in attempting to remove the boy from the wire. This motion was denied, and an exception taken. It will be noted that the motion to strike out the testimony of the witness Lamb was not limited to that relating to his own experience.

Later, and in rebuttal, a witness James Bogardus, a common laborer, was produced by the plaintiff and allowed to testify that he received an electrical shock at one time, and was permitted to testify further as follows:

"Q. Connected with what was it, what kind of a light?"

"Mr. Hawley: Object to it as immaterial and not rebuttal.

"Mr. Ellis: It is claimed that electricity will not affect; if it does, it wears right off at once. I offer to show by this man he was struck by electricity over a year ago, and he feels the effects of it yet; that is what I offer to show.

"Mr. Hawley: I object to it as incompetent.

"Mr. Price: Part of their main case.

"Mr. Ellis: Meets the proposition they make that unless you get enough to kill it will not have any effect.
* * *

"Mr. Hawley: This man is not an expert; it is incompetent.

"Mr. Ellis: I don't claim he is an expert; he is giving his own experience. * * *

"The Court: Dr. Knapp's testimony you want to meet?

"Mr. Ellis: Yes, sir.

"The Court: He gave his theory and belief in the matter based upon what he had read and seen. * * *

* He may answer. * * *

"A. Common incandescent light 16 candle power.

"The Court: It strikes me as to the other question about whether a man would receive a shock, any man would be pretty well aware whether they were shocked, as well as were injured in any other way. I think it would be competent to show that. As to the subsequent effects, there might be some question. Its immediate effect may be shown."

Over the objection that it was incompetent, the witness was permitted to answer as to the immediate effect, to which defendants' counsel excepted. The witness answered as follows:

"A. They were working at the schoolhouse fixing a chimney. I went in there in the morning. There was no light on. I says, 'I should think you could see better if you could move the light on.' I reached up and turned the light on. It was dark, I couldn't see it, and the brass around the socket was charged, so the minute I touched it my hand grasped right around it, I couldn't let loose of it, and I fell right back on a stove

that was there, and I hollered to get loose from that, and Dummy Cole grabbed the bulb and pulled it out. I couldn't get up. The men that were there picked me up and carried me to the basement door and sat me into a chair there. After I got done trembling and gained my strength a little I got up and went home. I couldn't use my arm that day at all. I went back and locked up the house. Gradually, after a few days kept working off, and I went on and done my work."

There was a motion to have the whole statement stricken out as immaterial and incompetent, which was refused, and an exception taken. The court remarked:

"I think as to its immediate effects he has given it may remain. * * *

"*A Juror*: Do we understand that the man grabbed hold of a globe, and couldn't let go of it?

"A. I couldn't let go, my hand here grasped; electricity will shut your hand as tight as can be, and you can't let loose of it.

"*A Juror*: I have taken hold of them things.

"A. I stood in water for one reason, some bad wiring.

"Q. The juryman wants to know whether you got hold of the glass, or what?

"A. I got hold of the brass right above in here, shut my hand over it, and I couldn't let go. I was standing where they had mixed mortar. It was wet; that brass was charged. Once before when I had reached in that way I had felt a little twinge in one of my fingers, but that time I got it, and it knocked me down quicker than blazes."

We do not think it was error to refuse to strike out the opinion evidence of the witnesses Lamb and Hicks, and the motion was not directed to the actual experience of the witness Lamb, much of which had been drawn out by defendants' cross-examination. We do think, however, the case being a close one, that it was prejudicial error to receive the testimony of the witness Bogardus as to his individual experience under

other and different conditions. It raised a collateral issue. It is urged by plaintiff's counsel that an expert may be contradicted otherwise than by the testimony of other experts, and the cases of *Reeve-v. Dennett*, 145 Mass. 23 (11 N. E. 938), and *Commonwealth v. Leach*, 156 Mass. 99 (30 N. E. 163), are cited in support of the position. An examination of those cases will show that they are readily distinguished. In the last-cited case the court said by way of illustration:

"If, for example, expert witnesses were to testify that it would be impossible to propel a vessel by steam across the Atlantic Ocean, * * * it would not be necessary in reply to call other experts to give opinions to the contrary. The direct facts might be testified to by any person who knew them."

Here there was no such general question in dispute. The question was as to the effect under similar circumstances and conditions as shown in the instant case.

4. Cross-examination as to contents of medical works.

Plaintiff's counsel on cross-examination asked Dr. Riley the following question:

"Q. Isn't it a fact that authorities, in just such cases as that, have not yet determined whether there is molecular change or not?

"Mr. Hawley: Object to it as incompetent.

"The Court: He may state.

"Mr. Hawley: Take an exception.

"A. I think the man you are referring to there says that it is not known whether they are molecularly changed or not."

This witness had already testified that, in his judgment, the plaintiff was not suffering from any organic disease or injury to the nerves or nerve centers.

In his testimony Dr. Dewey, another of defendants' witnesses, was equally emphatic in asserting that, when nerves are affected by a shock, it does not cause

any organic or any molecular change in them, and that he knew it from observation and reading. After drawing out this fact on cross-examination the following question was asked by plaintiff's counsel:

"Q. It is a medical fact, or laid down as a fact, that an animal that is killed by electricity, there is a change in the condition of the nerves, a molecular change or a pathological change?

"Mr. Hawley: Object to it as incompetent.

"The Court: He may answer.

"Mr. Hawley: Take an exception.

"A. No, sir; I never heard of such a thing."

Thereupon plaintiff's counsel in the same connection asked:

"Q. Now, doctor, do you mean it isn't in the medical works, that doctrine advanced and sustained by authority, there can be a molecular change by electricity in the nerve?

"Mr. Hawley: Object to it as incompetent.

"The Court: He may state.

"Mr. Hawley: Take an exception.

"A. I know it is claimed, and I know the opposite is claimed by medical men. The question is an undecided one; therefore there has been no evidence to prove it."

It is claimed by appellants that the purpose of the above cross-examination was to import into the case the theory of some author to rebut or refute the testimony of these witnesses, and that the effect was to practically destroy their testimony, and the following cases are cited: *Marshall v. Brown*, 50 Mich. 148 (15 N. W. 55); *People v. Millard*, 53 Mich. 63, 75, 77 (18 N. W. 562, 567). To which may be added *People v. Hall*, 48 Mich. 482 (12 N. W. 665, 42 Am. Rep. 477); *People v. Vanderhoof*, 71 Mich. 158 (39 N. W. 28); *Fox v. White Lead & Color Works*, 84 Mich. 676 (48 N. W. 203).

In *People v. Millard*, *supra*, this court said:

"Another source of error quite as mischievous, *
* * was the introduction of what is no more than hearsay evidence, in the shape of references to writers and books in such a way as to invoke their authority. As we have had occasion on more than one record to explain heretofore, expert evidence is only admissible on the theory that the jury cannot be supposed to comprehend the significance of facts shown by other testimony which needs scientific or peculiar explanation by those who do comprehend it. But this does not permit hearsay testimony of the written or spoken opinions of other persons, whom the jury have no means of examining as to their learning, their honesty, or their sources of special knowledge."

In *Marshall v. Brown, supra*, the question arose upon the cross-examination of the witness, as here. We are of the opinion that the refusal of the court to sustain the objections of defendants' counsel to these questions constituted reversible error.

5. Was there error in permitting Dr. Allen to rebut the diagnosis of defendants' physicians? We think not. See *Laughlin v. Railway Co.*, 62 Mich. 220, 227 (28 N. W. 873).

6. We have examined the other assignments of error relating to the admission of evidence, and are of the opinion that there was no error in the rulings, except that Dr. Riley should have been permitted to answer the following question:

"What is the fact, doctor, with hysterical patients as to whether or not there is an element of deception and simulation mixed up with their ailments, either always or some of the time—whether characteristic with hysterical people?"

Neither do we think there was error in the refusal of the court to direct a verdict for either defendant.

We think that the charge of the court as to the duty of the defendants was well within the ruling of this court in *Sykes v. Village of Portland, supra*.

We think that the question of contributory negligence was one of fact, and was properly submitted to the jury. It cannot be said, in the light of the evidence, that the attempt of the plaintiff to rescue the son was so rash as to entail certain injury to her.

The charge of the court is complained of by appellants in many respects, and, among other things, that it was too general in its language. For instance, the court said, "It is for you to say whether the village was negligent, and in what way"; and it is urged that this was without limitation or qualification of any kind as to the necessity of finding that the negligence, if there was any, must be in some particular specified in the declaration, and supported by evidence at the trial.

A reference, however, to other parts of the charge shows that the attention of the jury was called to the declaration, and the negligence there alleged, and the necessity of evidence to support it.

It is also urged that in the charge the measure of damages was not properly limited, and that it was broad enough to enable plaintiff to recover for loss of earnings and earning capacity, although she was a married woman. No requests to charge upon that subject were proffered, and, while the charge was very general, yet as the error complained of would only affect the amount of the verdict, and, as the case must go back for a new trial, it is sufficient to say that upon another trial the charge should be more specific and guarded upon the subject.

We have examined all of the assignments of error which have been argued, and find no other reversible error; but for the errors which we have pointed out and which affected both defendants we feel constrained to reverse the judgment, and grant a new trial, with costs to appellants.

KUHN, OSTRANDER, BIRD, MOORE, STEERE, BROOKE, and PERSON, JJ., concurred.

KING v. VAN SLACK.

1. CARRIERS—CONTRACTS—PAYMENT OF FREIGHT BY CONSIGNEE.

It was lawful for a carrier to agree with the shipper, at the time of receiving the goods, that the carrier would collect the freight from the consignee.

2. SAME—BILL OF LADING—OWNER OF GOODS.

Upon shipment of goods through a carrier to a third party, and a delivery to the shipper of the bill of lading, the consignee is *prima facie* the owner of the property.

3. SAME—ACTION FOR FREIGHT CHARGES—LIABILITY OF SHIPPER.

Where defendants shipped goods under an agreement with the carrier and the consignee that the freight charges should be paid by the consignee, and the goods were delivered and the charges demanded collected, the consignee, and not the shippers, became liable for the difference between the amount demanded and the true legal rate.

Error to Gratiot; Searl, J. Submitted June 21, 1916.
(Docket No. 44.) Decided September 26, 1916.

Assumpsit by Frank W. Blair, Dudley E. Waters, and Samuel M. Felton, receivers of the Pere Marquette Railroad Company, against C. E. Van Slack and others for freight charges. Paul H. King was by stipulation substituted as plaintiff for Mr. Felton, and when Mr. Blair resigned his name was dropped, leaving as plaintiffs Paul H. King and Dudley E. Waters. Judgment for defendants on a verdict directed by the court. Plaintiffs bring error. Affirmed.

Parker, Shields & Brown (Seward L. Merriam, John C. Bills and J. T. Matthews, of counsel), for appellants.

Fred J. Northway (Edwin H. Lyon, of counsel), for appellees.

STONE, C. J. This is a suit in assumpsit to recover the balance of freight charges on shipments of butter made by defendants from Breckenridge, Mich., a point on the Pere Marquette Railroad, to New York, Boston, and other eastern points, all outside the State of Michigan. The bill of particulars covers a period from about May 1, 1909, to about September 1, 1913.

On the trial it appeared that for some time prior to May 1, 1909, to December 31, 1910, the Breckenridge Creamery Company was a partnership composed of all the defendants; that on December 31, 1910, defendant Obert severed his connection with the company, from which time until October 15, 1913, defendants Eldridge and Van Slack continued the business as partners. The plaintiffs therefore elected to proceed against all of the defendants for the period covered by the bill of particulars up to December 31, 1910. Plaintiffs claim for balance of correct amount of freight charges according to the lawfully filed and published tariffs in effect at the time, \$345.85.

The suit was started in the name of Frank W. Blair, Dudley E. Waters, and Samuel M. Felton, receivers, but subsequently Mr. Blair and Mr. Felton both resigned, and Mr. Paul H. King was appointed as receiver in place of Mr. Felton. No appointment was made to fill the place made vacant by the resignation of Mr. Blair. By stipulation duly filed Mr. King was substituted as plaintiff for Mr. Felton, and when Mr. Blair resigned his name was dropped as one of the parties, leaving as plaintiffs Paul H. King and Dudley E. Waters, as receivers.

The shipments were made by defendants upon ordinary straight bills of lading (a sample of which is attached to the record), about 75 per cent. of which were prepared and signed by the defendants at their office, and presented to the carrier's agent; the balance being made out at the station. Defendants, in making the

sales of the butter covered by the shipments in the bill of particulars, invariably made arrangements to sell their output in advance of the time when they made shipments.

By the terms of their agreements with the consignees, defendants were to deliver the butter to the carrier (plaintiffs) at Breckenridge, and the consignees were to pay the freight at destination, upon the various shipments. All shipments of butter made by defendants during the time covered by the bill of particulars to the various consignees named therein were made in pursuance of and according to those arrangements. On each package of butter covered by the bill of particulars there was marked the net weight of the butter and the tare, making up the total gross weight of shipment. Defendant Fred L. Eldridge had charge of that part of the business, and had personal knowledge of the making of each and all of the shipments referred to in the bill of particulars. He was called under the statute for cross-examination, by the plaintiffs, and testified, without contradiction, as follows:

"For a time I billed all of the 60 pound tubs, so called, at 60 pounds. Then Mr. Fea (plaintiffs' agent) instructed me to bill them at 72 pounds. I do not know when this was. I am unable to state whether or not that was after the time we began to use the larger tubs that I have spoken of. I weighed, or knew of the weighing of each of these tubs or other packages of butter shipped, and covered by the bill of particulars in this case, and that the exact and substantially precise weight of each package, both as to net weight of the butter, and the weight of the package itself, was placed upon the outside of the package. I am not able to say now what the exact weight of any one shipment was. During all the time that the railroad company had the shipment in its possession as a carrier it had that means of information before it, to determine the exact weight, from reference to the tubs. It made not

a penny's difference to me whether the tubs were billed at 60 or 73 pounds. I simply billed them as directed by Mr. Fea, the local agent of the Pere Marquette Railroad Company.

"Q. And did you at any time during the time of the shipments covered by this bill of particulars either look yourself at any ruling or regulation of the Interstate Commerce Commission, or were you otherwise informed that the requirements of the Interstate Commerce Commission were otherwise than you were directed by Mr. Fea to bill the goods?

"*Plaintiffs' Counsel*: I object to that as immaterial. He may have been informed as to the rulings of the Interstate Commerce Commission.

"*Defendants' Counsel*: It is a negative, that he had no information on that subject.

"*The Court*: Do you think it is important here to show that—they propose to show that he didn't enter into any agreement to rebate.

"*Defendants' Counsel*: I propose to show his good faith.

"*Plaintiffs' Counsel*: He wants to get out from under that. It is irrelevant and incompetent in this case.

"*The Court*: You claim he is liable whether he entered into the agreement or not?

"*Plaintiffs' Counsel*: Certainly; whether he knew or not. We are not trying Mr. Eldridge on an indictment for underbilling. We are seeking to collect freight charges, and his knowledge or lack of knowledge cuts no figure under the issues in this case. * * *

"*The Court*: I think the testimony is competent. (Exception by plaintiffs' counsel.) * * *

"A. I was not.

"Q. And whether or not in making these shipments at 60 pounds for 60 pound tubs, and the other weights that you shipped them at, whether or not you acted in good faith?

"A. I did."

C. W. Fea was the local agent of plaintiffs at Breckenridge at the time of the commencement of these shipments, and remained such agent, and in charge of its office there, during the time of all the shipments involved in the case. At the commencement of the

shipments Mr. Eldridge called the attention of said agent of plaintiffs to the fact that the net weight and the tare, showing the gross weight, were marked on each one of the packages, and Mr. Eldridge also asked him to weigh the butter, in case any question arose as to his stating the total weight of the shipments upon the packages, to which the agent replied that he had no time to do anything of that sort. Fea instructed Eldridge, prior to the first shipment mentioned in the bill of particulars, to bill the tubs of butter at 60 pounds per tub, and Eldridge followed his directions, and the same was true of the small tubs, packages, and boxes. Defendants did not pay freight in advance upon any of those shipments, and were never asked to pay in advance.

Upon the subject of the agreement with the plaintiffs to ship the butter subject to freight charges, Mr. Eldridge testified as follows:

"Q. About the time you began making shipments to the East did you have a talk with Mr. Fea, the local agent, in reference to the shipments, and payment of freight and so forth?

"A. Yes, sir; that was the first day we were in business. * * *

"*Plaintiffs' Counsel*: I object to that as immaterial and irrelevant, and for the further reason that no authority on the part of the agent has been shown, and as matter of fact he didn't possess any authority to bind the defendant.

"*The Court*: I don't think it is irrelevant, and it is material, unless you are right upon your proposition of law that, no matter what bargain they made, they could not change the law.

"*Plaintiffs' Counsel*: That is the basis of my objection so far as the materiality and relevancy is concerned.

"*Defendants' Counsel*: If that arrangement is not forbidden by the interstate commerce act, and I say that it not from an examination of the act and the amendments, that the railroad company carrying un-

der that arrangement cannot accept part of the contract which makes in its favor, and seek to get rid of the rest.

"The Court: So far as the authority of the agent is concerned, if he was there in charge of the office, it would be presumed that he had the right to make arrangements to ship goods, within the law at least. He may answer the question. * * *

"Defendants' Counsel: I propose to show such facts and circumstances as will show that the arrangement and agreement was that the company was not to look to the consignor, the Breckenridge Creamery Company, but to the consignees, or to their lien upon the freight for the freight; and that agreement is not in violation of the interstate commerce act.

"The Court: He may answer. (Exception.) * * *

"A. I said to him that we had a shipment of butter, and we wished to ship it, collect, charges to be paid at the other end, and asked him if it was all right, and he replied that it was.

"Q. Was it shipped that way?

"A. It was.

"Q. And did he ever notify you to the contrary in any shipments after that?

"A. He did not.

"Q. Was there any other or different arrangement made between you and the company or the agent of the company at Breckenridge in reference to these shipments, except that they were to be shipped, and the freight collected at the other end?

"A. There was not."

This evidence was uncontradicted.

All of the shipments in question were made f. o. b. Breckenridge, and defendants then made draft on the consignee for 60 per cent. of the selling price, and received the remainder from the consignee when the shipments reached their destination. The Pere Marquette Railroad Company did not reach the destination of any of the shipments in question with its own lines, but delivered them to the next connecting line at Suspension Bridge, N. Y. Upon issuing the bills of lading referred to, plaintiffs would make out a way-

bill, and send this forward with the goods, first turning it over to the conductor who picked up the goods, and it being turned over with the goods to the connecting carrier. Plaintiffs did not offer any evidence showing the weights of the shipments in question, either as to the weights of the butter or the weights of the tubs, and on that question the following occurred on the trial:

*"The Court: * * * You haven't shown yet that a dozen people didn't weigh these tubs. The law presumes that they were weighed. Does the railroad company take the weight of the shipper, under the interstate commerce law?"*

"Plaintiffs' Counsel: They have the right to weigh them, or they can take the weight of the shipper, or they can guess at the weight. They are not bound to weigh them, and there is no presumption that they did weigh them, and, as a matter of fact, in this case they were not weighed."

Defendant Eldridge testified, without contradiction, that defendants' books showed the actual weight of the butter, but that there was no way, then, to tell from their books or invoices the total weight of the butter and packages; that defendants did not keep any record of the actual gross weight of the butter and tubs, and that the butter itself weighed from 60 to 62 pounds, and the packages from 8 to 12 pounds; that unsalted butter is lighter than salted butter, and that he could not tell which kind predominated in the shipments, although "as one big guess" he "should imagine about half and half," and that the salted butter would go from 60 to possibly 61 or 63 pounds, and that the salted butter tubs would run from 10 to 11½, and occasionally one up to 12 pounds, while the unsalted or sweet butter tubs would run from 7½ to 9 pounds.

Plaintiffs did not prove the actual weights of the shipments, and conceded that they were not entitled to go to the jury on the actual weights, but claimed the

right to recover upon the basis of the estimated weight of 73 pounds per tub. During all of the time covered by the bill of particulars the tariffs in effect contained the provisions as follows:

"Estimated Weights—Misc.

"Butter or butterine 60 pounds in tub per tub 73 pounds. When actual gross weight of butter, butterine, or eggs received from connecting railroads, or otherwise, are in excess of the estimate weights herein specified, such actual weights shall be charged, and same shall not be reduced to basis of estimate weights.

* * *

"The estimated weights shown in this item will be used when actual weights cannot be ascertained by weighing or otherwise on shipments made locally between all points on the Pere Marquette Railroad, and on shipments from stations on Pere Marquette R. R. to all points on connecting roads to which through rates governed by official classification are in effect."

It appeared that there were no proper scales at Breckenridge with which to weigh the tubs. It is the claim of the plaintiffs that freight charges were assessed and collected from the consignees upon the billed weights of the butter as furnished by the defendants. It is uncontradicted that the goods were all consigned to the purchasers upon whom the drafts were made, and there is no claim that the goods were not delivered to, and received by the consignees, who paid the freight charges then demanded. The conditions printed upon the back of the bill of lading contain the following:

"SEC. 8. The owner or consignee shall pay the freight and all other lawful charges accruing on said property, and, if required, shall pay the same before delivery."

At the close of the testimony, upon motion of the defendants, the court directed a verdict for the defendants upon the following grounds, viz.:

(1) That the suit should have been brought by the delivering carrier, and not by plaintiffs.

(2) That neither railroad company could recover of defendants "after having accepted shipment of the goods with the understanding that the charges were to be collected at the other end, and after having released the goods to the consignee, without having collected these extra charges, especially in view of the fact that the actual weight was marked upon each tub of butter."

(3) That the provision in the tariff providing for estimated weight of 73 pounds per tub was not applicable in the case, because the actual weight could have been readily ascertained.

A judgment for the defendants was duly entered. There was a motion for a new trial, which was denied, and exceptions duly taken.

Plaintiffs have brought the case here upon writ of error; and error is assigned upon certain rulings in the admission of testimony, and in the charge of the court, and especially in refusing to direct a verdict for plaintiffs, and in directing a verdict for defendants.

In our view of this case, from the undisputed evidence, it is unnecessary to consider the numerous questions discussed by appellants, for the reason that there is an insuperable obstacle in the way of plaintiffs' right to recover of these defendants. This is not a case where the consignee has refused to accept the goods and pay the freight. It is a case where the consignee has accepted the goods and has paid such charges as have been demanded of him, and is liable to pay such other charges as are legal, upon demand. We have examined the authorities cited and others, and find none against the proposition that it was lawful for plaintiffs to agree with defendants, at the time of receiving the goods in question, that they (plaintiffs) were to collect the freight in question from the consignees. It is not necessary to decide whether such an agreement was, in the first instance, binding upon the consignees. They accepted the goods and paid all

charges demanded. The consignees were *prima facie* the owners of the goods.

"Upon shipment of goods through a carrier to a third party, and on delivery to the shipper of the bill of lading, the consignee is *prima facie* the owner of the property." *Sturges v. Railway Co.*, 166 Mich. 231, 239 (131 N. W. 706).

See, also, *Turnbull v. Railroad Co.*, 183 Mich. 213, 219 (150 N. W. 132); *New York, etc., R. Co. v. York & Whitney Co.*, 215 Mass. 36 (102 N. E. 366); *Hutchinson on Carriers* (3d Ed.), §§ 177, 735, 807.

The consignees were, in fact, the owners of the goods, and accepted them and became liable solely to pay the lawful freight. As the carrier is in general entitled to collect freight from the consignee as a condition of delivering the goods, so the consignee who actually received the goods is liable for freight, although it may not have been exacted before delivery. 5 Cyc. p. 501, and cases cited.

No case cited by appellants would authorize the bringing of this action against the consignors upon the facts as disclosed here. There is no evidence that any demand has ever been made upon the consignees, as was the case in *Baltimore, etc., R. Co. v. Box & Basket Co.*, 48 Ind. App. 647 (94 N. E. 906, 96 N. E. 28), cited by appellants.

Nothing is claimed by way of bad faith on the part of defendants in underbilling the goods, as appears by the record. It is not a case of double liability. The consignees, the owners, are solely liable, upon this record.

We are of the opinion that the trial court made a proper disposition of the case, and it is unnecessary to consider the other questions discussed by counsel.

The judgment below is affirmed.

KUHN, OSTRANDER, BIRD, MOORE, STEERE, BROOKE, and PERSON, JJ., concurred.

JOHNSTON v. CORNELIUS.

1. TRIAL—EVIDENCE—DISCONTINUANCE—DEMURRER TO EVIDENCE—DIRECTING VERDICT.

Where an action is brought against more than one defendant, and plaintiff does not care to dismiss as to any one of them, he need not do so, under Circuit Court Rule 43, § 3, yet, if there be no evidence as to any defendant joined in the action, the court may, and properly did, direct a verdict against plaintiff and in favor of the particular defendant, according to Act No. 182, Pub. Acts 1899, 3 Comp. Laws 1915, § 12628, relating to demurrers to the evidence.

2. AUTOMOBILES—DEATH—NEGLIGENCE—AGENCY—MASTER AND SERVANT.

Where the death of plaintiff's decedent was caused by defendant's automobile while it was being driven by the minor son of the owner, without his knowledge or authority, defendant was not responsible on the theory that he had knowledge of the son's incompetency and was chargeable with having allowed the son to operate a dangerous agency, nor did the fact that defendant owned the car furnish any presumption of liability.

3. SAME—AGENCY—NEGLIGENCE.

To create a liability the act must have been within the scope of the son's employment and in conducting what was properly the father's business.

4. SAME—DIRECTED VERDICT—COURT—JUDGMENT.

The trial court did not commit error in directing a verdict in favor of the father, at the close of the plaintiff's case, or discharging the jury which disagreed as to the other defendant, and was authorized to enter an order describing the proceeding as a verdict for the party in whose favor the direction was given.

5. SAME—AGENCY—KNOWLEDGE.

Where the testimony of the son was somewhat contradictory and tended to impeach him, but, leaving it out of consideration, there was no evidence of an agency, the court did not err in holding that the owner was not liable for

a death arising while the car was being used by the minor son.

Error to Kent; Perkins, J. Submitted June 14, 1916. (Docket No. 100.) Decided September 26, 1916.

Case by Eleanor M. Johnston, executrix of the last will and testament of Andrew W. Johnston, deceased, against Harold C. Cornelius and Russell Cornelius for the negligent killing of plaintiff's testate. Judgment for defendant Harold C. Cornelius on a directed verdict. Plaintiff brings error. Affirmed.

Ellis & Ellis (C. G. Turner and Francis A. Stace, of counsel), for appellant.

Lombard, Hext & Washburn, for appellee.

STONE, C. J. This is an action brought by the plaintiff, as executrix of the last will and testament of Andrew W. Johnston, deceased, against Harold C. Cornelius and Russell Cornelius for damages resulting from injuries to plaintiff's decedent, occasioned by an automobile owned by defendant Harold C. Cornelius, and being driven and operated by Russell Cornelius, the infant son of Harold C. Cornelius, about 9 o'clock on the evening of November 28, 1913, and from which injuries Mr. Johnston died on December 12, 1913.

At the trial and at the conclusion of the plaintiff's testimony, upon motion of defendant Harold C. Cornelius, the trial court entered an order discharging said defendant from liability, and the jury disagreed as to the liability of the son, Russell Cornelius. From the judgment in favor of defendant Harold C. Cornelius, the plaintiff has brought the case here on error, and we have only to deal with that judgment; as there has been no verdict or judgment as to the defendant Russell Cornelius.

Andrew W. Johnston was a resident of Grand Rapids. On the 28th of November, 1913, about 9 o'clock in the evening, he left his home on the east side of North avenue, in said city, and accompanied a Miss Van Winkle to the street car on Michigan street, which latter street runs east and west. It was a dark, rainy night, and Mr. Johnston was carrying an umbrella. Upon leaving Mr. Johnston's home the evidence tended to show that the parties went south on the east side of North avenue until they arrived at the intersection of the sidewalk on the north side of Michigan street, at which point they stopped and looked east up Michigan street, and saw a street car approaching approximately 100 feet away. They did not see any automobile. They then turned west and stepped down into North avenue, at its intersection with Michigan street, and walked diagonally across such intersection to a point in Michigan street south of the west sidewalk of North avenue, and a few feet from the car tracks. As they stopped and were about to take the street car they were struck and run over by an automobile owned by the defendant Harold C. Cornelius, and being driven west and operated by Russell Cornelius, a boy 17 years old and the son of said Harold C. Cornelius. Mr. Johnston was dragged for some distance under the automobile, and received serious injuries from which he died as above stated. The declaration alleged the joint liability of the defendants. There were six counts. The first count alleged that the defendant Russell Cornelius was the son and employee of the defendant Harold C. Cornelius, and was a member of his family, and a boy of immature years, to wit, 17 years, and was a careless, reckless, and negligent operator and driver of said automobile, all of which was well known to the defendant Harold C. Cornelius, and that said Harold C. violated his duty in allowing, and not preventing his automobile from being taken control of, operated, or driven on Michi-

gan street by such an incompetent, incapable, and careless operator and driver.

The second count alleged that the automobile was a pleasure vehicle, which was then and there driven by Russell Cornelius, who was an unlicensed chauffeur, and minor son and member of the family of the defendant Harold C. Cornelius, and was then and there the representative, servant, agent, and employee of the said Harold C. Cornelius, and the count was based upon the breaches of statutory duties.

The third count alleged the same, with the additional statement that the defendant Russell Cornelius was driving the automobile with the permission, knowledge, and consent and in and about the business of the said defendant Harold C. Cornelius, and alleged a breach of the ordinances of the city of Grand Rapids.

The fourth count made the same allegations concerning the agency of Russell Cornelius and knowledge of defendant Harold C., and alleged a breach of duty in not stopping said automobile and preventing the same from running over or upon said Johnston, etc.

The fifth count alleged that the defendant Harold C. Cornelius was the owner and was possessed of an automobile of large size, and capable of being driven at more than 25 miles an hour, and that when driven recklessly, carelessly, and negligently it became dangerous to the safety of persons upon the streets and highways, that Harold C. Cornelius knew that his son was a careless, reckless driver, and that it was the duty of Harold C. Cornelius not to permit or authorize said Russell Cornelius to take or use said automobile, and that Harold C. Cornelius violated his duty to the public by permitting Russell Cornelius to drive said automobile, when he knew that Russell was a careless, reckless, and negligent operator and driver of automobiles, and was a boy of immature years.

The sixth count is like unto the fifth, and also alleges

that Harold C. Cornelius went away from home and left said automobile in the care and keeping of Russell, knowing that the latter might take the automobile, and drive and operate the same on the public streets, as he had done before, and that Russell, in violation of law, wilfully and maliciously and without the consent of Harold C. took the automobile and drove the same upon the public streets, and that he wilfully, maliciously, wantonly, and recklessly drove and operated the same at, to wit, 20 miles per hour at, against, and over the said Johnston.

The injuries sustained by Johnston were fully set forth in each count, with claim for damages.

Upon the trial the plaintiff called the defendant Russell Cornelius for cross-examination under the statute. We have read his testimony and the entire record with great care, and we think that it may be stated that it is undisputed that the son, Russell, at the time of the accident, had no right or authority to take the car from the garage; that he had no rightful personal control whatever over this automobile, and never had had any such control. He was not a licensed chauffeur, and while he frequently operated the car in going after his father at the factory where the latter's business was, or in taking his mother or grandmother, or both, or even other members of the family out to drive, or for his own use, it was always done under the supervision, consent, or direction of one of the parents; that he never had any right to take the automobile out, without first obtaining permission to do so either from his father or mother. It appeared that on one occasion he had taken the car without consent. This was about one year before the accident. He was then punished for doing so by being refused the use of the car for himself for two weeks. It further appeared that he had never attempted to interfere with, or use the car of his own volition for about one year before this

night. On the night in question his father and mother had gone out to dinner with some friends, using their electric car, leaving the one in question in the garage. It further appeared that on that occasion they instructed Russell, the son, to remain at home and care for a younger brother, and he had no permission to take the car out. After the departure of his parents he did take the car out, took his younger brother to a neighbor's home, who were friends of the family, and left him there, and from there he drove to the corner of Prospect avenue and Michigan street, where he met and took out to ride a young woman, a friend of his. They then drove down town, a distance of about a mile, and went to a place known as "Sweet's" where ice cream, etc., are served. Following this he started to take the young lady back home. It was while going west on Michigan street, and when only about 250 feet from the young lady's home, that the unfortunate accident occurred.

In the course of the examination of Russell Cornelius by the plaintiff he was interrogated as to certain testimony given by him before the coroner relating to matters that occurred at the time of the accident, and such testimony before the coroner was offered by the plaintiff as tending to impeach the witness. As we have already said, at the close of the plaintiff's testimony defendants' counsel moved the court to direct a verdict of no cause of action in favor of the defendant Harold C. Cornelius for the following reasons:

(1) "Because the plaintiff has failed to establish any liability on the part of said defendant Harold C. Cornelius for the injuries complained of in the plaintiff's declaration."

(2) "That it has appeared from the undisputed evidence in the case that the automobile in question was at the time of the accident being operated by defendant Russell Cornelius, for his own pleasure, without the

knowledge, consent, approval, or permission of the defendant Harold C. Cornelius."

(3) "Because, under the undisputed evidence in the case, said automobile was, at the time of the injury complained of, being operated by defendant Russell Cornelius, without the knowledge, consent, approval, or permission of said defendant Harold C. Cornelius, and against his express instructions, given by him to said Russell Cornelius."

After a lengthy discussion of the question, the court granted the motion placing its decision upon the rule stated in *Loehr v. Abell*, 174 Mich. 590 (140 N. W. 926), and *Daugherty v. Thomas*, 174 Mich. 371 (140 N. W. 615, 45 L. R. A. [N. S.] 699, Am. & Eng. Ann. Cas. 1915A, 1163).

Counsel for plaintiff contended that the plaintiff was not bound by the testimony of Russell Cornelius, under the statute; that, evidence having been received tending to impeach him upon material matters, it was for the jury to say whether he had sworn falsely in all particulars.

After the ruling of the court, which was duly excepted to, the jury were called in and the court said:

"Well, gentlemen of the jury, this case from now on will proceed as against only one of the defendants, and that is Russell Cornelius, the son. A motion has been made, argued, and determined in your absence as to both of these defendants, on a request to take the case from the jury and direct a verdict in favor of the defendants. That motion has been granted as to the defendant Harold C. Cornelius, based upon a recent decision of the Supreme Court that, where, under circumstances similar to the circumstances in this case, the father was the owner of an automobile, and the son, with a general knowledge of the father that the son used the automobile, took the automobile on one occasion, and used it for his own pleasure and advancement, and an injury resulted, the father is not liable for the negligence on the part of the son in running an automobile and consequent damages;

that, if any one is liable, it would be the son, because the relation of master and servant or principal and agent does not exist between the father and son, under those circumstances; and, while it, may be inferred that the father gives permission to the son to use an automobile which is bought for the family use, that inference is not sufficient to create a personal liability against the father for the son's own tortious act, when the son is using the machine for himself, and not for the father, or other members of the family. On those grounds I have directed a verdict, and I will at the proper time direct you to render a verdict of no cause of action as against the defendant Harold C. Cornelius."

The trial then proceeded against the defendant Russell Cornelius, and testimony pro and con as to his liability was received. In its charge to the jury the court made no reference to the defendant Harold C. Cornelius, and the jury were not instructed to return any verdict of any kind as to him. The jury, after being out for a time, were unable to agree as to the liability of the defendant Russell Cornelius, and were finally discharged. When the court announced its decision that it was going to direct a verdict in favor of Harold C. Cornelius, no order was entered by the court in the journal, and no order was actually entered in the journal until some days after the termination of the trial, and after the jury were discharged, and then an order was entered in the journal under the date of the said announcement, as follows:

"In this cause, the parties by their respective attorneys and the jury heretofore duly impaneled being present in court, the trial was resumed, and the said jury sat together, and, after hearing further proofs and allegations of the said parties, said court orders and directs that a verdict of no cause of action as to defendant Harold C. Cornelius be rendered."

Here follows the judgment for said defendant in the usual form. We quote from the record:

"That in fact the jury was not directed to give any verdict in the cause, but was told by the court that he would direct them at the proper time, and that the final judgment of disagreement was entered in the journal at the close of the trial on the 28th day of May, and the part of the judgment of May 25th, after the word 'parties,' was an amendment to the journal entered some days after May 28, 1915."

Afterwards, on the 9th day of June, the plaintiff made a motion to set aside the order of the court made by the court as of the 25th day of May, and grant a new trial of said cause against both of said defendants. The motion was denied; the court filing its reasons therefor, which were duly excepted to by the plaintiff.

The following questions, properly raised by assignments of error, are discussed by counsel for appellant:

(1) "Could the circuit judge legally announce to the jury in the middle of the trial what the verdict as to Harold C. Cornelius would be, and inform the jury at that time that he would later direct a verdict in favor of the defendant Harold C. Cornelius?"

(2) "Was the plaintiff entitled to the presumption against Harold C. Cornelius arising from the ownership of the car, and was such presumption waived by the calling of Russell Cornelius?"

(3) "Did the court have a right to enter an order, and call it a verdict in the record, without submitting the question to the jury?"

(4) "Was the defendant Harold C. Cornelius free from all negligence, or should his conduct, under the evidence and the declaration, have been submitted to the jury?"

(5) "It being admitted that the automobile was bought and owned by defendant Harold C. Cornelius as a family car, was the question of agency of Russell Cornelius for the jury?"

1. The question here presented is whether the trial court had the right at the close of the plaintiff's case to direct a verdict in favor of a defendant against whom there was no evidence?

We have a statute which provides that upon the trial of any case the defendant, upon the conclusion of the plaintiff's testimony, may request the court to direct the jury to bring in a verdict for the defendant, or demur to the evidence, without resting his case absolutely. Act No. 182, Pub. Acts 1899, section 12967, 5 How. Stat. (2d Ed.) ; 3 Comp. Laws 1915, § 12628.

Counsel for appellant calls attention to former Circuit Court Rule 27, subd. c, which is now found in section 3 of Rule 43, and reads as follows:

"But in case an action is brought against two or more defendants, the plaintiff shall not be required to discontinue as to any of them, but the jury shall show by their verdict, or the court by its finding, in a trial by the court without a jury, which of them are and which of them are not liable to the plaintiff, and judgment shall be given accordingly."

In *Pruner v. Railway*, 173 Mich. 146 (139 N. W. 48). this subdivision of the rule was referred to. In that case we affirmed a judgment against the railway, where the trial court at the close of the proofs directed a verdict in favor of the city of Detroit, and submitted the case to the jury on the liability of the railway. See, also, *Mally v. Wrapper Co.*, 181 Mich. 568 (148 N. W. 443), and cases cited.

In *McPherson v. Pinch*, 119 Mich. 36 (77 N. W. 321), it was held that, where one of the parties admitted his liability under this subdivision of the rule, the jury should have been instructed to render a verdict against him, provided they did not find a third party liable. We are of opinion that there is nothing in this rule that interferes with the court's authority and duty to direct a verdict in behalf of any joint defendant against whom there is no evidence of liability, at the close of the plaintiff's case.

2. We do not think the ownership of the car by Harold C. Cornelius furnished any presumption of liability

under the undisputed facts in the case. The real question involved is whether or not, at the time of the accident, Russell was using the car in his own behalf and for his own pleasure. In our opinion, the case is ruled by our own decisions. *Loehr v. Abell, supra*; *Daugherty v. Thomas, supra*; *Hartley v. Miller*, 165 Mich. 115 (130 N. W. 336, 33 L. R. A. [N. S.] 81); *Riley v. Roach*, 168 Mich. 294 (134 N. W. 14, 37 L. R. A. [N. S.] 834).

As was said by Knappen, J., in *Denison v. McNorton*, 228 Fed. 401, 142 C. C. A. 631:

"The father is not liable for the son's alleged negligence merely because of such relationship; his liability, if any, must rest upon the relationship of principal and agent, or that of master and servant. Defendant's mere ownership of the machine is not enough to create liability for his son's negligence. *Lotz v. Hanlon*, 217 Pa. 339 [66 Atl. 525] 10 L. R. A. (N. S.) 202 [118 Am. St. Rep. 922, 10 Am. & Eng. Ann. Cas. 731]. To have that result the act complained of must have been done within the scope of the son's employment and in conducting what is called the father's business. *White Oak Coal Co. v. Rivoux*, 88 Ohio St. 18 [102 N. E. 302] 46 L. R. A. (N. S.) 1091 [Am. & Eng. Ann. Cas. 1914C, 1082]."

In the *Denison Case*, from which we have quoted, a judgment for the plaintiff against the father was affirmed, and it is cited by plaintiff's counsel. In that case the son was driving the car taking other members of the family on a trip to a resort for recreation. The case is readily distinguished from the instant case, as shown by the following language:

"A significant feature of this case, which distinguishes it from some of the cases relied on by defendant, is the fact that all the members of defendant's family (so far as at home) were participating in the use of the car; there being no other occupant except a family guest. The importance of this consideration is illustrated by the cases of *Doran v. Thomsen*, 76

N. J. Law, 754 [71 Atl. 296, 19 L. R. A. (N. S.) 335, 131 Am. St. Rep. 677], and *Missell v. Hayes*, 86 N. J. Law, 348 [91 Atl. 322]. In the former case the father was held not liable for the negligence of his daughter in driving the car for her own pleasure, notwithstanding its purchase by the father for the use of his family, and his implied consent that the daughter use it for the purpose stated. In the latter case, where the accident occurred while one of the sons was driving the car, which contained also defendant's wife and daughter, together with a guest of the son and a guest of the daughter, the facts were held sufficient to support a finding that the son was acting as the servant of his father, and within the scope of his employment as such. The fact that the car was occupied by the father's immediate family and their guests was held to distinguish the case from *Doran v. Thomsen*."

3. We are of the opinion that the court did not err in directing the verdict and judgment for the defendant Harold C. Cornelius in the manner shown in the record. Manifestly, if the court had the right to direct the verdict and did direct it, the jury had no duty to perform in the matter, and we think the court had the power to amend the record to show the facts. We find no error here.

4. We think that the fourth question should be answered by stating that, under the undisputed evidence, the defendant Harold C. Cornelius was not guilty under any count in the declaration.

5. We think that the fifth question has already been answered, and that there was no evidence of the agency of Russell Cornelius. Counsel for appellant complain that they were not permitted to go to the jury upon what they term the conflicting testimony of Russell. The tendency of the claimed contradictory statements would have been to impeach him. The difficulty is that, with Russell's testimony entirely eliminated from the case, there is nothing to show any liability of defendant Harold C. Cornelius under our decisions, and

we are only concerned here with the question of his liability.

Finding no error in the record, the judgment of the court below is affirmed.

KUHN, OSTRANDER, BIRD, MOORE, STEERE, BROOKE, and PERSON, JJ., concurred.

WINN v. ADJUSTABLE TABLE CO.

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—AGREEMENT FOR COMPENSATION—FRAUD—REPUDIATION.

Where there was no evidence of any deceit practiced by the agent of an insurance company in obtaining an injured employee's signature to an agreement for compensation for the loss of a finger, and he did not ask to have it read, nor read it himself, although competent to do so, and he claims that he supposed it was a receipt, he will not be heard to deny its validity.

2. SAME—WORKMEN'S COMPENSATION ACT—REVIEW BY INDUSTRIAL ACCIDENT BOARD.

Such agreement may be reviewed by the Industrial Accident Board, upon proper showing, under section 13, pt. 3, Act No. 10, Extra Session 1912, and the compensation ended, diminished, or increased in accordance with the law and facts, but, as a general rule, the essentials leading up to the award are to be taken as *res adjudicata*, except the physical condition of the injured employee.

3. SAME—WORKMEN'S COMPENSATION ACT—PARTIAL DISABILITY—LOSS OF FINGER.

The order of the Industrial Accident Board setting aside an agreement between the employer's insurer and the injured employee fixing the compensation for the injury as provided in the law for the loss of a finger, and awarding

compensation as for partial disability, is reversed, for the reason that the loss of the finger, combined with a former accident, rendered the employee totally incapacitated from following his trade as a carpenter, and the provisions of the law providing compensation for partial disability are inapplicable (section 10, pt. 2, Act No. 10, Extra Session 1912), and the agreement entered into was in accord with the law and should stand.

ON REHEARING.

4. SAME—BASIS OF AWARD.

Held, the claim of applicant that the award of the board was based in part upon an impairment of the shoulder, due to the accident, is not sustained upon the record, and the former decision is affirmed.

Certiorari to the Industrial Accident Board. Submitted April 24, 1916. (Docket No. 67.) Decided September 26, 1916. Resubmitted June 27, 1917. Former opinion affirmed July 26, 1917.

Edward H. Winn petitioned the Industrial Accident Board for an order setting aside an agreement entered into by him with the United States Fidelity & Guaranty Company, insurer of the Adjustable Table Company, for compensation for injuries received in the course of his employment. From an order setting aside said agreement and awarding additional compensation, respondents bring certiorari. Reversed.

Travis, Merrick & Warner, for appellants.

H. Monroe Dunham and *John M. Dunham*, for appellee.

Edward H. Winn, the claimant, while employed by the defendant the Adjustable Table Company, had the third finger of his right hand cut off, between the first and second joints, by a rip saw. He was taken to a hospital, where the finger was amputated at the second

joint. The accident occurred on the 21st of October, 1914. Necrosis of the bone having set in, the finger was opened on November 11th, and the bone scraped. On the 21st of November it was found necessary to remove the entire finger, and to take out the metacarpal bone up to the metacarpal joint. Thereafter the wound healed slowly, and claimant suffered considerable pain in his shoulder, which continued to the time of the hearing before the Industrial Accident Board. One of the physicians who examined claimant thought that the pain was caused by an inflammation of the joint capsule, called arthritis, caused by the germs and poison of the decaying tissue. The other was of the opinion that the trouble with the shoulder had no connection with the injury to the finger.

Several years before his employment by defendant, claimant had suffered an injury by which he had lost the larger part of the three other fingers of the right hand; but up to the present accident, by the use of the thumb and the third finger, he had been able to follow his trade as a carpenter. With the loss of the third finger also he was no longer able to work at his trade.

On the 28th day of November, 1914, claimant entered into an agreement for compensation with the insurance company carrying the risk. By this agreement he was to receive \$7 per week for a period of 20 weeks. That was the amount provided by statute for the loss of a third finger. Nineteen weekly payments were made to claimant under this agreement; but he declined to receive the last payment, and, on the 6th day of May, 1915, filed a petition with the Industrial Accident Board asking that the agreement be set aside and that further compensation be awarded him. To this petition an answer was filed by the Fidelity & Guaranty Company; and at the hearing an order was

made by the Industrial Accident Board allowing claimant compensation at the rate of \$7 per week during the period of his disability, but not to exceed, in all, 200 weeks. Defendants bring the case to this court by certiorari, insisting:

(1) That the agreement in regard to compensation, made by the parties, is binding upon them, and correctly states the compensation to which claimant is entitled; and

(2) That the award of the Industrial Accident Board is for a disability arising largely from an injury in no way connected with the accident in controversy; and that it is in excess of the amount allowed by the compensation act.

PERSON, J. (*after stating the facts*). It is not shown that any deceit was practiced by the agent of the insurance company in obtaining the agreement for compensation. Claimant says that he supposed it was a receipt when he signed it, but that he did not ask to have it read, nor did he read it himself, although he was competent to do so. Under these circumstances he will not be heard to deny the validity of the agreement. *Sanborn v. Sanborn*, 104 Mich. 180 (62 N. W. 371). But such an agreement may undoubtedly be reviewed by the Industrial Accident Board upon a proper showing, under section 13, pt. 3, of the act (2 Comp. Laws 1915, § 5466), and the compensation ended, diminished, or increased in accordance with the law and the facts. Upon such a review, as said in *Estate of Beckwith v. Spooner*, 183 Mich. 323 (149 N. W. 971):

"It can be stated as a general rule that the essentials leading up to the award, or its equivalent, are to be taken as *res adjudicata*, except the physical condition of the injured employee, which naturally and legally remains open to inquiry."

But the facts do not bring this case within any provision of the law that will permit an increase of compensation beyond the amount stated in the agreement.

The Industrial Accident Board found that claimant was totally incapacitated from following his trade as a carpenter, but it also found, as it necessarily must have found, that the total incapacity was not the result of the present accident alone, but of that in conjunction with the earlier accident. As was held by this court in *Weaver v. Maxwell Motor Co.*, 186 Mich. 588 (152 N. W. 993, L. R. A. 1916B, 1276) :

"The absence of either accident would have left the claimant partially incapacitated. We think it clear the total incapacity cannot be entirely attributed to the last accident. It follows that the compensation should be based upon partial incapacity."

But how can an award for partial disability be made, under the statute, in the presence of a total actual disability, except as a specific liability under the schedule in section 10 of part 2? There is no way by which we can fix the duration of a partial disability that has been merged in a total disability. This is true even if the partial disability is, as asserted by claimant, something more than the mere loss of the finger. And, if we could approximate its probable duration, there is no method provided for determining the amount of the compensation. The section referred to says:

"While the incapacity for work resulting from the injury is partial, the employer shall pay, or cause to be paid as hereinafter provided, to the injured employee a weekly compensation equal to one-half the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter." Act No. 10, Pub. Acts 1912, Extra Session, pt. 2, § 10 (2 Comp. Laws 1915, § 5440).

And it is impossible to know how much the claimant might have earned if suffering only from the partial disability, when, as a matter of fact, he cannot earn anything because of the total disability. The difficulty is illustrated by the award that the Industrial Accident Board made. That board found a total disability,

but did not make an award for total disability, inasmuch as it limited the payments to a period not exceeding 200 weeks, when for total disability they might have extended through a period of 500 weeks. Nor, on the other hand, did the board measure the amount of compensation by the statutory rule for partial disability. It evidently treated the injury as the loss of an arm for which the period of compensation is 200 weeks. But the arm was not lost within the meaning of the statute, and the order was unauthorized. It was an attempt to meet a situation not provided for by the statute, and neither the Industrial Accident Board nor this court has any power to do that.

The injury must be treated simply as the loss of the third finger, for which the claimant is specifically compensated by the terms of the statute. The agreement entered into by the parties was in accord with this provision, and must stand.

The order of the Industrial Accident Board is reversed, and the petition dismissed, but without costs.

STONE, C. J., and KUHN, OSTRANDER, BIRD, MOORE, STEERE, and BROOKE, JJ., concurred.

ON REHEARING.

FELLOWS, J. We were led to grant a rehearing in this case upon the claim made by the applicant that the award of the board rested in part at least upon an impairment of the shoulder, due to the accident, and by the insistence of counsel that we had overlooked this finding of the board in determining the case. We have re-examined the case, aided by briefs filed upon the rehearing, and conclude that the case made upon this record was correctly decided. In applicant's petition to the board to set aside and review the agreement there is no claim of disability by reason of any impairment of the shoulder. The petition alleges:

"That because of the condition of his hand he will suffer partial disability for the performance of work of any kind for the remainder of his life."

The testimony as to the cause of the condition of applicant's shoulder was in conflict. While the board mentioned the inflammation about the shoulder, there was no finding that the condition of the shoulder in any way contributed to applicant's disability, or that it was caused by the accident, and it was not made the basis of the award, and did not enter into it. The award was based upon the finding that the injury, "together with the previous loss of other members of the same hand," produced a total incapacity. In making the order it did, based upon this finding, the board was in error. The order is reversed and the petition dismissed.

KUHN, C. J., and STONE, OSTRANDER, BIRD, MOORE, STEERE, and BROOKE, JJ., concurred.

COLLIN v. KITTELBERGER.

1. TRIAL—APPEAL AND ERROR—EVIDENCE—WITNESSES—BOOKS AS EVIDENCE—CROSS-EXAMINATION.

Where plaintiff on direct examination used a diary to refresh his recollection and was interrogated on cross-examination as to several entries not relating to the case, a ruling of the court stopping the further examination was in the discretion of the trial judge and would only be reversed if the court abused its discretion.

2. SAME—EVIDENCE—HEARSAY—BROKERS—CONTRACTS.

Testimony, in a suit for broker's commissions, that in a conversation that related to the rental of a store which had been placed in plaintiff's hands to secure an occupier on commission, to the effect that he told the prospective tenant he could have the premises for a rental named, and that the latter was willing to pay the rental, was competent and not open to the objection that it was hearsay.

3. SAME—MISCONDUCT OF COUNSEL—PREJUDICIAL ERROR.

An order of the trial court, striking out improper remarks of one of the attorneys, and a direction, following the request of defendant's counsel to reprimand the attorney, to proceed with another question, was not reversible error or likely to be misunderstood by the jury.

4. SAME—CONTRACTS—CROSS-EXAMINATION.

A question asked of a party whether he knew that plaintiff thought he had a certain agreement was not improper cross-examination.

5. SAME—WITNESSES.

The objection that a subject had been already gone over was within the discretion of the court.

6. APPEAL AND ERROR—RECORD—ASSIGNMENTS.

Assignments of error should not be too general.

7. SAME—EXCEPTION.

On objection by defendant's counsel to a statement of plaintiff's counsel to the jury, not supported by the testimony, counsel not asking for or getting a ruling, the court will not review it.

8. BROKERS—FRAUDS, STATUTE OF—COMMISSIONS—CONTRACTS.

Act No. 238, Pub. Acts 1913, 3 Comp. Laws 1915, § 11981, requiring contracts for the commissions of a broker to be in writing, did not affect pre-existing agreements.

Error to Wayne; Mandell, J. Submitted June 23, 1916. (Docket No. 70.) Decided September 26, 1916.

Assumpsit by Frederick C. Collin against George Kittelberger for broker's commissions. Judgment for plaintiff. Defendant brings error. Affirmed.

James H. Pound, for appellant.

Samuel R. Williams (*Stevenson, Carpenter, Butzel & Backus*, of counsel), for appellee.

OSTRANDER, J. It is the theory of plaintiff's case that he was employed by defendant in January, 1913, to secure a tenant of defendant's building for a ten-year term beginning May 1, 1915, for \$5,000 a year rent, net, for which service defendant was to pay him a commission of \$800; that he found a man willing to make the lease and enter upon the term, to whom defendant made no objection, that defendant refused to lease, and later leased the premises to another, refusing to pay plaintiff his commission. This theory is supported by the testimony of plaintiff and that of the proposed lessee.

Defendant denied making the agreement, or any agreement, with plaintiff, and says that he did not contemplate leasing the premises, "except after giving his (defendant's) then tenant a first chance to rent at the price offered." The quotation is from appellant's brief. Defendant denied also that plaintiff ever informed him that he had secured a tenant for him upon the terms stated. The court submitted to the jury the question whether the agreement alleged was made and performed by plaintiff, and, if so, whether defendant refused to perform it. The jury returned a verdict for plaintiff, and judgment was entered on the verdict. A motion for a new trial was denied.

As no one claimed that defendant had performed, or was willing to perform, the contract set up by plaintiff, the only issues were the simple ones whether the contract was made, and, if made, was performed by plaintiff. It is the contention of defendant, appellant, that 41 errors, which may be fairly reduced to 30, were committed during or after the trial, and each assignment, the brief informs us, is relied upon.

The first assigned error discussed in the brief for appellant relates to a ruling which is complained about because curtailing unduly defendant's right of cross-examination. Plaintiff, upon direct examination, used a diary for the purpose of refreshing his recollection. Upon cross-examination he was interrogated with respect to various entries, not relating to this case, appearing therein. This was permitted for a time, when the court said:

"I think you have gone far enough to indicate the method of keeping the books, and that is all this testimony was competent for."

An exception was taken. What else there was in the diary, what particular item or entry it is claimed would have cast discredit upon it, what further purpose of counsel than that indicated by the ruling, does not appear. After stating in the brief that he was entitled to a lax rule and thorough examination, counsel says, and with this concludes argument upon this point:

"But I have had occasion to complain of this judge's idea of narrowing the issue before, and it does not do to repeat. He entirely misconceived what I was attempting to do. That is apt to occur from an endeavor to read another's thoughts, and I did not want to apprise the plaintiff in this case as to what I wanted, by arguing to the judge when he did not ask for it, or what I wanted."

Cross-examination for the purpose indicated is governed, and must be, by the discretion of the trial court, and in this case discretion does not appear to have been abused.

The second complaint discussed in the brief is of a ruling allowing an answer of a witness to stand. Interrogated about an existing lease, he had said it would expire May 15, 1915. The objection was that the lease was the best evidence. It does not appear that the

answer was incorrect, or claimed to be, or that defendant was or could have been prejudiced by the ruling. Commenting upon it in the brief, counsel for appellant says:

"And right here I want to call attention to Judge Mandell's method of doing business. The admission of this evidence is plainly against an elementary principle of the law of evidence. Still it is permitted, and this judge says, 'Note an exception.' And twice more he does the same upon the same page and four times upon page 23."

But the record discloses no other similar ruling and no other like objections. The other rulings referred to are upon another subject and relate to a conversation between plaintiff and his prospective tenant—the prospective tenant is testifying—and the testimony objected to was plainly competent as tending to support the contention and the testimony of plaintiff that he had found a tenant ready to accept the terms of defendant. The witness was testifying to the terms of the lease proposed to him by plaintiff and that he accepted them and was willing to make the lease. It is said in the brief upon this subject:

"Can there be anything clearer than that the talk of plaintiff and Wilson [the proposed tenant] not in defendant's presence was and is incompetent? Also the question:

"Q. Did he tell you the terms on which he could get the lease for you?" * * *

"This evidence, in and of itself, ruined our case for the defendant. It was something we could neither admit nor deny truthfully, because we knew nothing about it. The answer was: 'Yes, sir; he told me I could have the store. * * * I was willing to take a lease of that store, and so informed Mr. Collin.' * * *

"Q. Did you so inform Mr. Collin?

"A. Yes, sir; I told Mr. Collin that I was willing.

"Q. On what terms did Mr. Collin say he could get a lease?

"A. A ten-year lease, \$5,000 a year net.'"

If this is not an orderly and proper way to prove that plaintiff had, pursuant to his alleged contract, found a tenant willing to take a lease upon defendant's terms, no other way is suggested by counsel. The brief next complains of a ruling, or suggestion, made by the court when counsel for defendant was examining his client. Referring to plaintiff and to the times he had seen him and what had been said between them, counsel asked:

"Q. Was there any other talk, besides what you have given us now, that you had between you and this man in September. Have you told us all in regard to the renting of the property? That is the only business you had in hand between you. What was the September matter about?

"A. About some other tenant that he brought up to me for the same location, but nothing came of it.

"Q. Who was the party?

"*The Court:* That is immaterial, unless the same party now spoken of.

"A. No, sir. (Exception for defendant.)

"Q. Was it the same man?

"A. No, sir.

"Q. Did anything come of it? Did you enter into any bargain with the man he brought up?

"A. No, sir; I did not.

"Q. When after that was it that you saw him again?

"A. Along in December, just before the holidays.

"Q. When afterward did you see Mr. Collin next?

"A. In the same office. I called on his office there. I was there in January.

"Q. So from the first interview that you have given us, in December, you had no more talks with him until January; is that right?

"A. No, sir."

At considerable length thereafter the witness was interrogated upon the whole subject of his conversations with plaintiff. Counsel did not answer the court's suggestion that the answer to the particular question would be immaterial. It is not pointed out that, if the

witness had given the name of the party referred to, it would have benefited defendant. There is no appearance in the record or by explanation of any prejudice of defendant's rights. Counsel did not cease to pursue the subject, but says in the brief:

"How the defendant came to meet Collin appears from Kittelberger's testimony on record, page 29, lower half. The acquaintanceship of Kittelberger consisted of talks in relation to this property, and the one to some extent covering the other. I was entitled to both. But the court, without objection, rules the question out, tending to explain it. Assignment 9 covers it. I submit this error is well assigned, and should reverse this case. It would bear upon the range of price, if no other thing. This interference of the judge, unsolicited, was very irksome, and looked very prejudicial to the jury, who, as onlookers, would wonder at it, without suggesting who the judge was prejudiced toward, whether attorney or client."

Upon the cross-examination of defendant, there was a reprehensible and altogether uncalled for statement made by plaintiff's attorney, which the court immediately ordered stricken from the record. Defendant's counsel asked that plaintiff's counsel "be reprimanded for making such a statement." The reply of the court was, "You may proceed with another question," and the examination proceeded. There follows in the printed record during the progress of the cross-examination of defendant several recitals, of which the following is an example:

"Q. You knew that Mr. Collin thought at least he had an agreement with you when you received the letter of January 28th? (Objected to. * * * Struck out by order of court. Words stricken out are 'as incompetent.')

"*The Court:* Answer the question. * * * (Struck out by order of court. Words stricken out are: 'Note an exception.')

Of these recitals counsel for defendant says in the brief:

"Here comes the first of the conduct of the stenographer individually, which I complain of and severely criticise, to explain. The stenographer inserts, 'Struck out by order of the court.' I am probably voicing my objection at the same time.

"My objections were probably shut out from the stenographer having in his anxiety not to drop a word of what the court said. That is the only excuse I can see for his actions, except incompetency. But I didn't know it until I saw the transcript, and I protest, but it does me no good, nor my client either.

"Why courts should try to evade responsibility for their ruling, when they are immune from liability, I cannot tell, but some do, and they have, since the Supreme Court of Massachusetts sought to deprive one Burton of an appeal which it took all the British ministers, and the Secretary of State, Thomas Jefferson's, political influence, as well as Edmund Randolph, and President Washington, to get a review thereof by the Supreme Court of the United States. See volume 3 of Jefferson's Correspondence, letter to Mr. Hammond, British minister.

"Assignments 10 and 11 I call attention to. The judge gets indignant, and forgets to put in an exception after his adverse ruling. I insist that both the assignments of error are good. Not an exception, not a word of caution to the jury which the judge omitted or the stenographer in error neglected to take. But, God be thanked, the law gives us the exception, now, just the same, through the judicature act, now in force.

"I will not discuss this matter any further, because it is a subject I cannot express my opinion upon for reasons patent to any one, except the counsel opposed, and inasmuch as he objected to the insertion, and the lower court agreed with him, I do not expect either one of them to agree with me on this subject. But I do expect this court to, and will be much disappointed if it don't."

This is the entire of the argument upon this point. Assignments of error 10 and 11 are:

"(10) In allowing and permitting the insulting

question to be asked defendant without rebuke, although asked,

"Q. I am not asking about that letter. You must have rehearsed that for some time."

"This included 11, with Mr. Pound's request:

"*Mr. Pound*: I ask that the counsel be reprimanded for making such a statement.'"

In the brief for appellee an explanation is given of the apocryphal appearance of the record I have referred to. It is said that the words were stricken out by the court when the bill of exceptions was settled, for the reason that they were not in the stenographer's notes, and had been inserted in the bill by counsel for defendant in accordance with his recollection of what objections were actually made and what exceptions were actually taken.

So far as the reprehensible statement of counsel is concerned, the rebuke from the court was immediate. To immediately order that a question and statement of counsel be stricken from the record is, it would seem, a rebuke not likely to be misunderstood by counsel or the jury. The questions objected to and about the objections to which the stenographer's notes are regarded as faulty do not appear to be improper questions to be asked on cross-examination. In any event, the record is here, and obviously cannot be disregarded by this court upon this hearing.

The thirteenth assignment of error is based upon an objection that the subject had been gone over, an objection not recognized by the court, to whose discretion it was addressed. The twenty-first assignment of error is based upon an exception to a ruling excluding an answer to a question asked by counsel for defendant as follows:

"Q. Then you did not tell the truth, when you were on the stand before, that you only had one written proposition from Mr. Wilson?"

The argument made in support of the assignment is, "I submit this was error." Why it was error, and especially why this court should reverse the judgment on account of it, is not stated.

In argument to the jury, counsel for plaintiff made a statement of fact not supported by the record. Counsel for defendant excepted, but asked for and got no ruling from the court. It seems unnecessary to cite the numerous decisions holding that the point is not before us.

Defendant presented 11 requests to charge. Some of them were given, in substance; some others ask for a construction of testimony and a virtual finding of fact. The one most relied upon in the brief asks for a peremptory instruction favorable to defendant, and is based upon four assigned reasons, which are:

"*First.* Because at the time of the trial of this case no contract for a commission upon the sale of lands could be maintained, unless it was in writing, which this one sued upon in this case is not claimed to be.

"*Second.* Because the contract was in reference to a ten-year lease at \$5,000, which contract never became enforceable by a tender of a written lease, which was necessary to the commencement of this suit. ——— v. *Wilkinson*, ——— Mich. ———.

"*Third.* It was for the entering into a contract for a claimed leasing for a period of upwards of a year, which, by the statute of frauds, is in force in this State. It was a contract not operative in this case, because it was not in writing.

"*Fourth.* Because the suit is based upon the conveyance of an alleged interest in lands, to wit, a ten-year lease involving an outlay of \$50,000, which was inefficacious, for the reason that it was not in writing."

The contract for commission alleged by plaintiff was made before Act No. 238, Pub. Acts 1913 (3 Comp. Laws 1915, § 11981), was passed, and the act did not affect the validity of a contract, existing when it took effect. *Third National Bank v. Steel*, 129 Mich. 434

(88 N. W. 1050, 64 L. R. A. 119). If the alleged contract was made, plaintiff performed it when he found a prospective tenant ready, willing, and able to take the lease upon defendant's terms, and it is plaintiff's testimony that the defendant announced satisfaction with the tenant proposed. See, also, *Brittson v. Smith*, 165 Mich. 222 (130 N. W. 599), and cases cited therein upon the subject of the contract for commission being within the statute of frauds.

None of defendant's requests which were altogether refused should have been given. The case was clearly one for a jury, and, while the charge given is criticized as being in some respects less explicit than it should have been and as favorable to plaintiff, it fairly left to the jury the theories of the parties and the substantial and controlling issues of fact to be decided. No request was made by counsel for defendant to amplify or make more explicit any issue submitted or to give any definitions or explanations. To the time that the verdict was returned, I find no reversible error made out, and the verdict was not so clearly against the weight of evidence that this court may interfere with the ruling which refused a new trial.

The judgment is affirmed, with costs to appellee.

STONE, C. J., and KUHN, BIRD, MOORE, STEERE, BROOKE, and PERSON, JJ., concurred.

PEOPLE v. LAHNALA.

1. EVIDENCE—HOMICIDE—IMPEACHMENT OF WITNESS.

On the trial of a homicide case, it was improper to permit the prosecuting attorney to impeach the mother of the accused, who testified in his favor, upon being called by the prosecution, on immaterial statements alleged to have been made by her, and, the tendency of such testimony being to raise a false issue, was of so prejudicial a nature as to require the reversal of the conviction.

2. CRIMINAL LAW—IMPEACHMENT—EVIDENCE—HOSTILE WITNESSES.

It is competent for the prosecution to prove material contradictory statements of a witness who appears to be hostile, and whom the law compels the prosecutor to call as one of the eyewitnesses, or persons having knowledge of the circumstances, for the purpose of affecting his credibility.

Error to Houghton; O'Brien, J. Submitted June 26, 1916. (Docket No. 129.) Decided September 26, 1916.

John Lahnala was convicted of murder in the first degree. Reversed.

Grant Fellows, Attorney General, *L. W. Carr*, Assistant Attorney General, *William J. Galbraith*, Prosecuting Attorney, and *Edward McCormack*, Assistant Prosecuting Attorney, for the people.

Burritt & Burritt, for respondent.

OSTRANDER, J. August Lahnala was a farmer living in Stanton township, Houghton county, west, or northwest of Houghton, on a highway known as the canal road. The 5th day of September, 1914, was Saturday. August Lahnala, some of his children, and some hired men worked that day on his farm baling hay. In the evening he went to Oskar, a point between

his farm and Houghton, purchased and carried home some articles, riding a part of the distance, and to the entrance to his farm, with an acquaintance. He arrived home about 8 o'clock. His wife, some of his minor children, and a hired man had retired in the upper floor of the house. The house was dark, and he entered through a shed sheltering the kitchen door into the kitchen, placing his parcels on the kitchen table. With the noise he made in entering and soon after he had entered three shots were heard, and probably the noise made by his falling body and his cry after he was shot. No voice except his was heard; no sound of altercation or of a struggle. The investigation immediately made with a lighted lantern by his wife and the others there discovered his body on the floor, wounded, him incapable of moving or of speaking. He survived but a few moments. An attempt to use the telephone failed, and fear, it is said, prevented any one present leaving the house to summon aid until early morning. In the morning it was discovered that the telephone wires had been cut at a pole near the house, three empty cartridge shells were found in the shed, two bullets were buried in wood-work in the kitchen, one of which was recovered, and one was taken from the wound. The shells and bullets were such as are used in an automatic 32 caliber gun, and were manufactured by the Winchester Arms Company. A single footprint was found in the earth at the foot of the brace to the telephone pole upon which the wires were cut. A "pliers," with which wire can be cut, was found at or near the foot of the telephone pole. Nothing else about the premises connected with the tragedy appears to have been found or seen.

Besides his wife, Matilda, August Lahnala's family included several married sons and daughters, not living at home, and six or more minor children, some of whom

lived at home. Among the minors was John Lahnala, 18 years old September 20, 1914, who lived at home until May, 1913, when he left to work in one of the mines, returning to assist his father with the haying. He then went to Minnesota and Dakota, selling his labor, returning to Michigan in January, 1914. He visited his family and within a few days—three, perhaps—hired himself to work for a John Zurcher, who lived near by, with whom he remained until some time in April, 1914, frequently visiting his father's house. Then, his brother William having bought a farm in Alger county, John purchased land adjoining his brother's, and, William having built a house on his land, John made his home with his brother, working on his land and elsewhere until September, 1914, not returning to his father's home during that time.

The land which William and John owned was not far distant from Rumley, which is a station on the Munising & Southeastern railway near the line between Alger and Marquette counties. A railroad map of Michigan will show the railroads operating in the vicinity and the various junction points. To the west of Rumley, beyond Little Lake, south of Negaunee, on the Chicago & Northwestern Railway, is Swanzy. That John Lahnala was at Swanzy in the afternoon of September 4, 1914, and in the station of the Chicago & Northwestern Railway, is an undisputed fact. It is the theory of the people that from this point he went by train to Negaunee, there boarded a South Shore train for Houghton, which he reached about 8 o'clock p. m. on that day; that he was seen during the evening in Houghton, spent the night somewhere, was seen about Hancock and Houghton Saturday forenoon; that he visited his father's home in the evening, murdered his father, was seen passing along the road going away from his father's house shortly after the crime was committed, that he left Houghton that night, and was

at his brother's home on Sunday, September 6th. In this theory the motive for murder is ill feeling and dislike of the father by the son. The son owned an automatic gun of the caliber, and which would use cartridges such as were used in committing the homicide. Arrested while on his way, with other relatives, to attend his father's funeral, John Lahnala was informed against for the murder of his father, put upon his trial on February 15, 1915, and, after 20 days of investigation, a verdict of guilty of murder in the first degree was returned by the jury. He was sentenced to imprisonment for life. A new trial was refused.

In this court the record presented is certified as containing, in substance, all of the testimony "introduced in the case that is necessary to present the questions of law raised by this bill of exceptions and assignments of error accompanying the same." The assignments of error number 169. Such as are relied upon are discussed by respondent's counsel as presenting 29 questions.

A number of the questions may be properly disposed of without much discussion. No exception is found in the record as a basis for the second assignment of error, upon which the first question is raised. If it were otherwise, it would be assumed that after the preliminary examination of the witness by respondent's counsel, no further objection being made, no use was made of the memorandum by the witness which counsel regarded as improper. If the question was open, it would be necessary to consider whether a statement, or statements, consisting only of the answers made to interrogatories ought ever to be received as a confession or admission of a person accused of crime. Usually a question colors and gives meaning to the answer made to it.

It was not error to admit in evidence the gun owned by respondent. That he owned it and might have used

it does not prove that he did use it, or any weapon, to kill his father. But a case must be made piecemeal. It was not error to acquaint the jury with the fact that such a gun was designed to fire such cartridges as were apparently used by the guilty person, and to explain why such cartridges could not be used in the ordinary revolver.

As the record was made, the case could not properly have been withdrawn from the consideration of the jury. Nor was it error to instruct that the testimony was of such a nature that if the respondent did the killing he was guilty of murder in the first degree. The requests to charge preferred by respondent which ought to have been given were given, in form or in substance. The charge was an admirable one, open to no serious criticism. There are, however, some errors assigned which demand a more extended consideration. They challenge rulings admitting testimony tending to prove a motive for the commission of the crime, and tending to prove that respondent might have committed it—that he was in the vicinity; they challenge an examination and impeachment of respondent's mother; they challenge, some of them, the method of producing to the jury the testimony of witnesses taken upon the preliminary examination. They cannot be considered without a somewhat extended reference to the record.

Respondent was a witness in his own behalf, and not only denied having committed the crime, and denied that there existed any reason or motive for committing it, but his own and the testimony of others tended to prove that he was not in Houghton, or Hancock, or at his father's farm, on September 4th or 5th, but was at a distant point, in Marquette or in Alger county, when the crime was committed. I use the names of both counties, not because respondent's testimony was

uncertain, but because I cannot always fix the described location by county lines.

I have said that it was undisputed that respondent was at Swanzy in the afternoon of Friday, September 4th. He was at his brother's home on Sunday, September 6th. His movements Friday evening and on Saturday are therefore of large importance. Four witnesses were produced by the prosecution, a young man and three young women, who testified that they saw respondent in a candy store in Houghton between 8:15 and 8:30 p. m. Friday evening. There is no testimony of any witness who saw respondent on the railroad train, or saw him get off the train. The candy kitchen referred to is a public place, where ice cream is served, and the witnesses were there seated at a table in the rear to be served with ice cream. The witnesses had known respondent. At some time while they were there one of them (according to the testimony) recognized John Lahnala. She described his dress; said that he bought something, apparently, at the candy counter, and left the place. She was asked this question:

"Q. I will ask that while John was in there, or immediately thereafter, you made any remark to any of your three companions as to who you had seen."

She answered:

"Just at the time, not after he left, but just as he was leaving.

"Q. What remark, if any, did you make to any one of your three companions just as John was leaving?"

"A. Just as he came in and just as I noticed him, I told the girls, 'Look at John Lahnala,' and the girls all repeated 'John Lahnala,' and that was all."

The young man testified that he did not see respondent, whom he had known rather casually, until the remark, "There is John Lahnala," was made, when he turned his head, "noticed him there, and I was satis-

fied it was John. I didn't pay any more attention than that to him."

Another of the party testified that her attention was attracted by the remark above quoted, when she looked and saw respondent, and that she made a remark. Asked what her remark was, she answered "that it was John." The fourth member of the party testified that her attention was attracted by the same remark. No one is produced who claims to have seen respondent after he left the candy kitchen Friday evening, September 4th, before 8 o'clock the next morning, at or about which hour John Webber, who operated a ferry, testified that he rowed a man across the lake from the Houghton to the Hancock side. This witness testified that he knew respondent, had no talk with him, and that when the boat reached the shore on the Hancock side the man "ran up the hill and ran down the road, ran as far as I could see him." The next time he saw him was in justice's court after his arrest, or, at any rate, after he was in custody. On cross-examination this witness testified:

"Q. That on the morning of the 5th, between 8 and 9 o'clock, a fellow asked you to row him across the lake?

"A. Yes.

"Q. And he had his face blackened up?

"A. Yes.

"Q. And he got in the boat, and you rowed him across the lake?

"A. Yes.

"Q. And the only means you had of distinguishing him from some other person was the back of his neck and his ears wasn't black?

"A. Yes.

"Q. And you had never seen Lahnala but three or four times?

"A. Yes.

"Q. And from what you saw of him at that time, without speaking to him, you formed an opinion that it was John Lahnala; is that right?

"A. Yes.

"Q. And the officers came and talked to you?

"A. What?

"Q. And they confirmed your opinion, didn't they?

"A. Yes, sir.

"Q. Now, at the time that you formed the opinion that it was John was the time the officers came to talk with you, wasn't it?

"A. Yes, sir.

"Q. At the time you rowed him across the lake you didn't think anything about it, did you, John?

"A. No.

"Q. And you told Barney and myself that he was so blackened up that you couldn't tell who it was?

"A. Yes."

Two witnesses, a barber and his wife, testified that between the hours of 9 and 10 a. m. Saturday a man whom they did not know called at the shop in Hancock and asked for and purchased a mustache, paying 25 cents for it. After his arrest they saw respondent and were of opinion that he was that man.

A woman witness, who had been a schoolmate of respondent, testified that on the evening of Saturday, September 5th, she was at home about a mile from the Lahnala house and saw respondent passing by in the road. She says she was standing near the gate, inside the fence, a few feet from the traveled way, when her attention was attracted by some person coming from the direction in which Lahnala lived, walking fast. "He was running. That attracted my attention first. Then when he noticed me he stopped" and "walked very fast past me." After passing her, he ran. It was between 8 and 9 o'clock. Most of the witnesses testifying upon the subject say that the night was dark, and one, at least, that it was very dark. The witness testified that she could not tell whether respondent's face was blackened, or whether he wore a mustache. Neither said anything. Respondent did

not look at her. But she described the clothing worn by the person she saw.

I have referred to all of the testimony of witnesses who claim to have seen respondent in Houghton or Hancock, or the vicinity, on Friday or Saturday. To make it more probable that he was there, the prosecution produced a railroad ticket, and freight clerk who went on duty on the evening of September 4th at 7 o'clock, and went off duty at 3 o'clock the next morning. He testified that a train from Calumet for Nestoria and points east left Houghton at 10:55 that evening. The train arriving at Houghton from Marquette, due at Houghton about 8 o'clock p. m., arrived while the witness was on duty, but whether on time or not he could not state without reference to the train register, which register was offered and received in evidence, and from which it appeared that the conductor of the train reported the train at Houghton at 8:09 p. m., 14 minutes late. It is conceded that it was error to admit the register in evidence. See *People v. Dow*, 64 Mich. 717, 721 (31 N. W. 597, 8 Am. St. Rep. 873); *People v. Goodrode*, 132 Mich. 542, 547 (94 N. W. 14). But it is said that it was error without prejudice, because it is established otherwise that respondent was in Houghton during the evening between 8:15 and 8:30 p. m., and the jury have so determined.

The positive character of the testimony of some of the witnesses who say they saw respondent at Houghton is rather shaken by cross-examination and opposed and contradicted by testimony of statements made by some of them. It is to be considered, in respect to this branch of the case, whether in admitting testimony of the first and succeeding exclamations of the witnesses who were in the candy kitchen, and in admitting the train register in evidence, reversible error was committed.

In seeking to prove a sequence of facts, the estab-

lishment of any one of them often aids in establishing the others. The average mind will require less proof of a fact which naturally follows another established or admitted fact. So an apparent agreement of several persons that a fact exists gives some additional weight to the testimony of each of them when they later testify to personal knowledge of the fact. Whether any of the four witnesses who stated that he or she saw respondent in the candy kitchen actually saw and recognized him is of peculiar importance. Whether the recognition was casual and uncertain, three observers accepting in part the exclamation, or statement, of the fourth, they having no interest in the matter and no reason for testing the truth of the exclamation or statement, is also of peculiar importance. The testimony of the exclamations was not used to identify an occurrence or that a particular thing happened at a particular time; the time being fixed in the memory of the witness by a remark. *Cole v. Railway Co.*, 105 Mich. 549, 550 (63 N. W. 647). The vital question to each witness was not whether he or she remembered that they saw Lahnala *on a particular occasion*, but was whether he or she *did see and identify him upon an occasion which was fixed*. The effect was to sustain the testimony of each witness by proof of an exclamation or of exclamations, showing that at the moment there was apparently a concurrence of opinion as to the identity of the person observed, showing also that at the time each witness announced the identity of the person observed. It was as though each had said, "I know it was the respondent because I said so at the time." In *People v. Eagle*, 189 Mich. 404 (155 N. W. 460), testimony similar in character was held to have been erroneously admitted. See, also, *People v. Mead*, 50 Mich. 228 (15 N. W. 95); *Brown v. People*, 17 Mich. 429 (97 Am. Dec. 195). If respondent was in Houghton Friday evening, it is more

probable that Webber ferried him across to Hancock, more probable that he was seen in the barber shop, and that the young woman was not mistaken in saying that she saw him coming from his father's on Saturday evening, in the dark. If he was not seen in the candy kitchen Friday evening, all other testimony connecting him with the crime must at once be subjected to a new test before all reasonable doubt is removed.

Mrs. Matilda Lahnala was called by the people. This they were bound to do, since she had knowledge of facts—the return of her husband on the night he was killed and what she knew of his movements—connected with the homicide, and was the first one to see and touch his body after the shooting. As to all of these matters she gave her testimony, and no one disputes it. She was then interrogated upon direct examination upon other subjects, and among them as to whether she had a certain conversation on October 18th (after the shooting) with Robert Kuru. Having stated that respondent was not present, and objection having been made, the court inquired the purpose of the examination, to which the prosecuting attorney replied:

“It's for the same purpose, your honor, that I question relative to the telephone, simply to the matter of interest, showing interest and bias in this case, and for the purpose of refreshing her memory as to past events, and for the possible purpose of impeachment on the material issue.”

The objection being overruled, the examination proceeded as follows:

“Q. Did you have a talk with Robert's mother?

“A. Yes.

“Q. Did you not have a talk with Robert and his mother together?

“A. No.

“Q. I will ask you if you didn't say to Robert in the presence of his mother that you wanted to say something to him that you didn't want to say in the presence of his mother.

"*Mr. Burritt*: Now, if the court please, we object to that as incompetent, whether this witness did or did not make such a statement as contained in the question of the prosecuting attorney.

"*The Court*: I have heard the question, and I will overrule the objection.

"*Mr. Burritt*: I would like to have the question read again and give me an exception. (Last question read.)

"*Mr. Burritt*: Give me an exception to the ruling of the court.

"A. No.

"Q. I ask you if you did not at that time, not in the presence of Robert's mother, but to Robert, ask that he should go to the office of Burritt & Burritt, in Hancock, and tell them that he was the person who ran along the Oskar road past the Uusitala home on the evening of September 5, 1914, shortly after 8 o'clock.

"*Mr. Burritt*: We object to that, if your honor please, as incompetent and immaterial. It doesn't tend to prove or disprove the point in issue. It doesn't make any difference whether the witness made such statement or such request to the man Kuru or not. It can't affect this defendant unless they connect him with it in some way directly.

"*The Court*: It need not be directly.

"*Mr. Burritt*: He has got to be connected.

"*The Court*: I will overrule the objection. If he is not connected with it it will be stricken out.

"*Mr. Burritt*: Note an exception.

"A. No."

Continuing his examination of Matilda, the prosecuting attorney was permitted to elicit the following:

"Q. Do you not recall that in the summer of 1912 Eiono and his wife visited your place, and that August and Eiono went in the field, and that you and John and Eiono's wife had some talk in the kitchen?

"A. I don't remember.

"Q. Do you not recall that at this time you were cooking dinner, and that while cooking dinner you were telling about the trouble between John and his father? (Last question read. Objected to as incom-

petent, remote, and immaterial. Overruled. Exception.)

"A. They never had any bad trouble between them.

"Q. Will you answer the question? (Question repeated.)

"A. No.

"Q. Did you not then, in the presence of John, say to Eiono's wife, 'Willie is too easy with his father, and John is the boy that will kill him if he doesn't mend his manners'?

"*The Court*: The question is so obviously admissible there isn't any reason of objection till it's over.

"*Mr. Burritt*: I take exception to the ruling and statement of the court. (Last question read.)

"A. Never.

"Q. Did not John at this time get up from the chair where he was then sitting and say, 'If he doesn't change his ways I will—' and then leave the room without finishing his sentence?

"A. That isn't true."

Upon each of these points the prosecuting attorney was permitted to call witnesses in impeachment. In impeachment Mrs. Kuru said:

"A. I don't remember the talk had in the kitchen. I went outside to get the milk cans that were on the steps. Mrs. Lahnala followed me to the steps. She said that, 'I would like to talk to your boy, Robert, but I hardly can.' I asked her what she wanted to talk to him about.

"Q. And what was her answer?

"A. If he wouldn't go and tell Burritt & Burritt that he was the one that ran along the road here. This was not said in the presence and hearing of Robert. He went past to get some wood. She did not go to Robert and talk with him; she had a talk with Robert. I don't remember whether before she told me what she wanted she asked if Robert had run along the Oskar road on the evening that Mr. Lahnala was killed. That wasn't all of her conversation that I related a little while ago. * * * I then told her that he can't go and lie that way. He hadn't been there all day; he had been in another direction.

"Q. And what did she say to that?

"A. She said, 'You need not be afraid of that; one can't lose by it.' The boy came there then. He had an armful of wood. I told her that there was the boy, and then there is that which she said to the boy, 'Won't you go and tell Mr. Burritt that you were the boy who ran along the Canal road on your errands?'"

Robert testified:

"A. Yes; Mrs. Lahnala said, 'Won't you go to Mr. Burritt and tell him that you are the man who ran along the Oskar road that night in this direction?' I said I wouldn't go; that I hadn't been to Oskar all day."

On cross-examination:

"I don't know how Mrs. Lahnala happened to come to my house. I don't know whether my mother sent for her. Willie Lahnala was there to see me the day before. He said, 'Were you the one that was at Oskar that evening?'—the evening that the old man was killed, he said. He asked me whether I passed the Uusitala house the night his father was killed. I told him that I hadn't passed it. Willie was there to see me the same day Mrs. Lahnala was there; it was the same day. This is the last time I ever talked with either of them.

"Q. Didn't Mrs. Lahnala tell you that she heard that you went by the Uusitala house on the night of the 5th?

"A. I can't remember.

"Q. Didn't she tell you that if you did, and if you would go over to Burritt & Burritt's office and see them and make an affidavit to the effect that you did go by there, she would like to have you do so, and Burritt & Burritt would pay you for your trouble?

"A. She asked me, but she didn't say anything about being paid for the trouble.

"Q. Mrs. Lahnala said to you, in substance, that if you went by the Uusitala house on the night of September 5th, she would like to have you go over to Hancock to Burritt & Burritt's office and make an affidavit to that effect, or statement, see Burritt & Burritt, didn't she?

"A. No.

"Q. Well, what did she say to you?

"A. I can't remember what she said.

"Q. She said if you went by there she would like to have you come over to Hancock to Burritt & Burritt's office, didn't she?

"A. She said wouldn't I go to Burritt & Burritt's office.

"Q. She asked you if you wouldn't go to Burritt & Burritt's office and say to them that you went by the Uusitala house on the night of September 5th, between 8 and 9 o'clock?

"A. Yes.

"Q. She didn't say anything about paying for your trouble?

"A. No."

As to the other alleged conversation had in 1912, the impeaching witness testified as follows:

"Mrs. Lahнала said, 'There is a man, he will keep hired men to do the work and pay them, and he cannot keep his own children at home and get along with them like other people.' She said that 'he has work done by outsiders, can't get along with his own, and can't give decent words, especially so with Willie, because he is such a soft-natured fellow, never opposed him in anything.'

"Q. Go on.

"A. Pointing toward John, 'But there is a boy that he can't prod much.'

"Q. Go on.

"A. 'That he would just as lieve kill if he should become angry.' And then she said, 'And what of it if he should kill?'

"Q. What, if anything, did John then say?

"A. I said that 'That's too strong.' John said, 'Why should he be that way.'

"Q. Go on.

"A. John went out.

"Q. Was that all of the conversation at this time?

"A. There was no further talk. Then at the time that Mrs. said, 'What if he should be killed?' she threw potatoes into the kettle just at that time so that the water squirted up and splashed on the stove.

"Q. Did you ever hear any words between John and his father?

"A. No.

"Q. Did you ever hear John make any threats of what he would do to his father?

"A. I have not talked with him much.

"Q. Did John say anything else in the kitchen than you have already stated?

"A. No; he didn't say anything.

"Defendant moved to strike the testimony out as incompetent and immaterial. The point we make is any feeling Mrs. Lahnala may have had against her husband and anything she may have said concerning her husband cannot be charged up to this boy."

The people having rested, and several witnesses having been sworn for the respondent, counsel for respondent announced that he recalled Matilda, to which the prosecuting attorney objected, and the court ruled that, if she was called, it must be as a witness for the respondent for direct examination, to which ruling an exception was taken. Having been so reintroduced as a witness in the case, she testified, in substance, that Mrs. Kuru told her that she thought it might have been her son Robert who was seen running along the Oskar road on the night the murder was committed; that counsel for the respondent advised her to inquire into the matter; that she had no conversation with the son Robert, but only with his mother. She denied the statement which was attributed to her by the witness Vetriga Lahnala (Eiono's wife), and was then cross-examined at length by the prosecuting attorney, going over the same subjects, after which she was asked:

"Q. And were you satisfied to have John leave home? (Objected to as immaterial. Objection overruled. Exception.)

"A. I would have liked to have him at home. I have testified that John left because he couldn't get what he thought was proper clothes.

"Q. And you did think that it was not right that one of the boys, one of your boys at that age, should have to go away from home to work when the father was hiring help on the farm? (Objected to as irrelevant and immaterial. Objection overruled. Exception.)

"A. I have never said anything about that.

"Q. I didn't ask you what you said. I asked you what you thought.

"Mr. Burritt: We renew our objection as to what this woman thought as irrelevant and immaterial to this issue. (Objection overruled. Exception.)

"A. About what? (Last question read.)

"A. Because his father wouldn't give him any clothes he had to go away and earn money to get clothes.

"Q. And you thought that it wasn't right that he had to go away and earn money to get clothes? (Objected to as irrelevant and immaterial. Objection overruled. Exception.)

"A. I was just lonesome for the boy when he left.

"Q. And didn't you say, while you were talking to Mrs. Vetriga Lahnala in your kitchen, just exactly what Mrs. Vetriga Lahnala testified to, namely, 'That here is a man, August, that hires help and can't keep his own boys at home at work'?

"A. I haven't said anything like that. I don't remember of having said anything like that ever.

"Q. You want to testify now that you did not say what Mrs. Vetriga Lahnala has here testified you did say in your kitchen in the presence of John?

"A. I don't remember; I can't remember; I can't remember. I don't remember the conversation at all.

"Q. And you will not testify, then, that you did not have the conversation?

"A. I don't remember the talk at all. I don't remember. On our farm there are four 40's. Two 40's we have had for 27 years. The 40 the house is on and the other 40 is corner. We have had the third 40 nearly 20 years; the fourth 40, the farthest away from the house, about 10 years. That's the cow pasture. The 40's on which the house stands, one is east of Canal road and one west.

"Q. Whom do you consider owned the two 40's on

which the house stood at the time August was killed?

"*Mr. Burritt*: I object to that as incompetent. The fact as to whom she considered owned the land is incompetent and immaterial.

"*The Court*: This is only admitted as bearing upon her motives and credibility, etc., and I think I will overrule the objection. (Exception.)

"A. They all belong together."

As to the testimony of the interview of Matilda with the Kurus, mother and son, it was immaterial; respondent being in no manner connected with it. As to the impeaching testimony given by Robert and his mother, it was incompetent, because the testimony of Matilda was immaterial. The testimony was harmful to respondent, not alone because it was either merely immaterial or incompetent. This and other testimony with respect to which she was contradicted, and the final cross-examination of Matilda introduced into the case an apparent issue between the people and the witness, and the witness and the respondent were by suggestion and by inference made to stand together. The very statement of counsel for the people in offering the testimony of Matilda contained the suggestion. If the false issue was determined by the jury favorably to the people, respondent was correspondingly affected. The jury may have believed the Kurus and Mrs. Vetriga Lahnala and have believed that Matilda's purpose in interviewing the Kurus was sinister, although she says it was innocent. They may have believed that she hated her husband and was prepared to uphold her son in taking his life; that she, in effect, counseled such a course.

With respect to the impeachment of witnesses whom the people are obliged to call by the people, the rule is stated in *People v. Elco*, 131 Mich. 519 (91 N. W. 755, 94 N. W. 1069), where the subject is exhaustively reviewed. See, also, *People v. Miner*, 138 Mich. 290

(101 N. W. 536). Upon the authority of that case the impeaching testimony should have been excluded. The danger in any case is that not the sworn testimony given in court, but the unsworn, extrajudicial statements made by witnesses will be used to convict a respondent. The court advised the jury that the purpose of the examination and of the impeaching testimony was to affect the credibility of Matilda, and that it and similar testimony was not received and was not to be considered as substantive evidence of the guilt of respondent. But the credibility of Matilda in giving material testimony was not attacked. It was about immaterial things that the issue of her credibility, her bias and interest, was introduced into the case. What has been said upon this subject applies to the testimony of Matilda and the contradicting testimony, she being asked if she had told a certain person that her son was at work for the railroad company. Suppose that she lied about it. Respondent is not to be convicted because of her statements nor upon the suggestions which they give rise to. If it was believed that the mother was an accomplice of the son, she could have been charged as such. But to suggest her complicity, as some of the questions asked her plainly did, without asserting it, and to contradict her upon immaterial matters, was a course calculated to do respondent great harm.

It was error, not reversible error in view of other testimony, to prove the sale of the automatic gun, in evidence, to the brother of respondent by the record of the sale; neither the sale nor the record having been made by the witness. The same is to be said of the introduction in evidence of the record of the telephone company.

Concerning the transcripts of testimony of certain witnesses, which were received in evidence, it is to be said that the use made of them by counsel does not

appear. No opinion should be expressed upon the question presented, because whether what was done was reversible error depends, of course, upon what was done with them, what use made of them.

Wholly apart from the testimony I find objectionable, there was testimony requiring the case to go to a jury. Our attention is directed on the part of the people, among other reasons for denying a reversal of the judgment, to one based upon Act No. 89, Pub. Acts 1915 (3 Comp. Laws 1915, § 14565), which provides that no judgment or verdict shall be set aside on the ground of improper admission or rejection of evidence unless, in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice. Without attempting an interpretation of the law or deciding whether in any case the justices should or will act in the capacity of jurors, I find in this case prejudicial error in admitting testimony calculated, notwithstanding the advice of the trial court to the jury, to induce the conclusion of fact which was reached when, if it had been excluded, a different conclusion might have been reached. In my opinion, that is, and must always be, a miscarriage of justice.

For the errors pointed out, the judgment is reversed, verdict set aside, and new trial granted. Respondent will be delivered into the custody of the sheriff of Houghton county to be dealt with according to law.

STONE, C. J., and BIRD and PERSON, JJ., concurred with OSTRANDER, J.

MOORE, J. I agree with Justice OSTRANDER there was prejudicial error.

KUHN, BROOKE, and STEERE, JJ., concurred with MOORE, J.

WARREN v. VANDERVELDE.

BROKERS—COMMISSION—CONTRACTS.

In a suit for brokers' commissions where the agents did not secure a purchaser at the price stipulated in their contract, but secured a prospective buyer that finally took the property at a lower price during the life of the contract, *held*, that the evidence did not warrant the court in directing a verdict for defendant; that the question, under conflicting proofs, was for the jury.

Error to Kent; Perkins, J. Submitted June 13, 1916. (Docket No. 61.) Decided September 26, 1916.

Assumpsit by David H. Warren and Charles Rummell, copartners as Warren & Rummell, against Tryntje Vandervelde for brokers' commissions. Judgment for defendant on a verdict directed by the court. Plaintiffs bring error. Reversed.

Hatch, McAllister & Raymond, for appellants.

Charles E. Ward, for appellee.

OSTRANDER, J. In justice's court plaintiff declared orally upon all matters provable under the common counts in assumpsit and specially for a commission for the sale of real estate. Judgment for defendant was entered. In the circuit court the cause came on for trial before the court and a jury, and the trial was ended when the court directed a verdict for defendant. The plaintiffs, appellants, insist there was an issue of fact for the jury "on the question of whether or not the defendant wrongfully interfered with 'plaintiffs' pending negotiations with a prospective customer, and made the sale herself, thus entitling them to their commission," and regard the case of *Davis-Fisher Co. v.*

Hall, 182 Mich. 574 (148 N. W. 713), as controlling. It is undisputed that defendant desired and for a considerable time had tried to sell her farm, for which she asked \$5,500. A sign was posted at the farm, and advertisements were put in one or more papers, giving notice that the property was for sale. Finally, plaintiffs undertook to sell the farm under an agreement reduced to writing, but not correctly printed in the record. By the agreement the selling price was fixed at \$5,700. The agreed commission was 5 per cent. upon \$2,500 of the selling price and $2\frac{1}{2}$ per cent. upon the balance. The agreement or agency was to terminate after 30 days' notice by the owner, and it was provided that the commission was to be paid if the "farm is sold directly or indirectly" by plaintiffs. There is the further provision that:

"If sold by owner without any aid of said agents, then the price will be \$25.00 as compensation for their trouble and expense in advertising said farm."

The writing bears no date, but was made, as the record is understood, in the latter part of July, 1912. Notice of termination of the agency was given October 15, 1912, and the contract was surrendered November 16, 1912. Defendant, on November 23d arranged to sell the farm for \$5,500 to one James Boyland, and the conveyance of the property to him was completed by delivery of the deed November 28th. It is undisputed that plaintiffs introduced Boyland as a possible purchaser, and that defendant knew that plaintiffs had tried, or were trying, to sell him the farm for \$5,700. Plaintiffs did not, within the time limited, produce a customer who announced himself ready and able to pay \$5,700, or any other price, for the farm, but did produce one (Boyland) during the term limited who, knowing the price asked by plaintiffs, desired to examine the premises and soil, and who did, on November

2d and November 11th, visit the premises for that purpose. He was not produced as a witness at the trial, but it appears that he expressed to plaintiffs the view, or opinion, that defendant wanted too much for the farm, and stated that, while he knew the property, he would look further into the matter. Plaintiffs, too, were of opinion that \$5,700 was too large a price for the land. On November 2d, when Boyland visited the farm, he was told that it was not for sale. On November 11th, when he was at the place examining soil, defendant did not, she says, see him. On November 18th, the defendant, Boyland having called on her in Grand Rapids, fixed \$5,500 as the price for the farm, but wished to consult her son about the sale, and did write to her son.

Plaintiffs make the argument which was successfully made in *Davis-Fisher Co. v. Hall*, *supra*, namely, that defendant is not in a position to say that they would not have made the sale; that Boyland was, to use the language of the opinion in that case, "a promising prospective purchaser, who not only had not refused plaintiff's offer, but with whom it might well pursue negotiations with fair prospects of success, but for the fact" that defendant advised him and the plaintiffs that the place was not for sale.

Defendant gave testimony tending to prove that she had desired to sell the farm and live in Grand Rapids, but concluded, before she moved to Grand Rapids, that she would not sell the farm, and would return to it. In any event, she wished, before determining to sell, to see how she liked to live in the city. Some rumor that an interurban railway passing by or near the farm would be built came to her, and was another reason given for determining not to sell and for canceling her contract with plaintiffs. Satisfaction with city life and the discovery that the railway was not to be built were reasons for again concluding to sell

the farm. The testimony for the defendant, if believed, would indicate her good faith in withdrawing the land from sale and canceling the contract of agency. But from all of the testimony and the circumstances disclosed by it, I think the inference might be drawn that within the life of the agreement plaintiffs indirectly sold the farm, that defendant did not, in good faith, withdraw the property from sale, but was ready and willing at all times to sell it for \$5,500, and that the announcement that the place was not for sale and the cancellation of the contract were acts in an attempt to deprive plaintiffs of a commission. Upon the authority of *Davis-Fisher Co. v. Hall, supra*, and *Smith v. Anderson*, 2 Idaho (Hasb.), 537 (21 Pac. 412), the case should have gone to the jury.

The judgment is reversed, with costs to appellants, and a new trial ordered.

STONE, C. J., and KUHN, BIRD, MOORE, STEERE, BROOKE, and PERSON, JJ., concurred.

STEEL v. BLANCHETTE.

1. HOMESTEAD—EXEMPTION—ABANDONMENT—EVIDENCE.

As mere absence from her homestead for four or five years would not conclusively establish abandonment of the homestead rights of an old lady of seventy-five years of age, the enforced absence of such owner because of feeble health or the necessity of going out to earn a living, by work as a nurse, did not authorize a creditor to levy on the property, though she also, about the same time, sold her furniture and rented the land and residence, and had

offered to sell the place in a deal for certain village property which she could have occupied in the same manner. The question of abandonment of a homestead is principally a question of intention.

2. SAME—INTENT—SALE—PROCEEDS.

Upon selling the homestead with the purpose of investing the proceeds in another home, the proceeds also become exempt during the transition up to the statutory limit of fifteen hundred dollars.

Appeal from Oceana; Sullivan, J. Submitted June 6, 1916. (Docket No. 2.) Decided September 26, 1916.

Bill by Elizabeth Steel against Victor J. Blanchette for a decree setting aside an execution levy on complainant's homestead. From a decree for complainant, defendant appeals. Affirmed.

F. E. Wetmore, for complainant.

Hall & Greene, for defendant.

BIRD, J. Complainant asked for and obtained a decree in the trial court setting aside an execution levy on her premises in Oceana county, claiming that they constituted her homestead. The defendant resisted the proceeding upon the ground that prior to the levy of the execution in December, 1914, complainant had abandoned her homestead. The same contention is made in this court.

Defendant contends that in leaving the premises soon after the death of her husband in 1909, and living elsewhere, and offering the premises for sale, she has abandoned her homestead right therein. The premises, consisting of 40 acres, were purchased by complainant in 1907, and she and her husband resided thereon until his death in 1909. Soon after she sold the furniture, except her bedding, and lived around among her relatives, and at times acted in the capacity of nurse. She

had several Michigan relatives, and a son and daughter who resided in Northern Indiana. She testified that she was induced to take this action because of the advice of her sister that it was unwise for a woman of her age to remain in the farmhouse alone. She was at that time 74 years of age. She rented the place from year to year to a tenant, and on the income derived therefrom, and the income from her work as a nurse, she has paid her living expenses and her taxes. She has no other property, either personal or real. She insists that she never abandoned the premises as her home, and that when she rented it and went away she did it with the intention of returning, and it was shown by complainant's relatives that she frequently stated that she was going to return to her home.

1. The sole question is one of abandonment. The mere absence from the premises 4 or 5 years would not be conclusive that she had abandoned it as a homestead if she had, during all that time, intended to return. *Kaeding v. Joachimsthal*, 98 Mich. 78 (56 N. W. 1101). In a way her absence from her homestead appears to have been enforced. It is evident that a woman of her age could not work the premises. The income from the farm, which was shown for two years to have been \$65 a year, would have been insufficient to support her and pay the taxes. The question of abandonment of her homestead is almost entirely a question of intention. 21 Cyc. p. 602; *Bunker v. Paquette*, 37 Mich. 79. When she asserts that it was her intention to return to her home, and that it was never her intention to abandon the premises as her homestead, I can find no good reason in the record for disbelieving her, or doubting the sincerity of her claim. Most people, and especially elderly people, have some place they call home, even though they do not occupy it much of the time; and, notwithstanding defendant insists that

she has abandoned this home, the record does not disclose that she has any other home.

But it is argued that her offer to sell it was evidence of abandonment. Complainant explains this by saying that at one time she offered to trade the premises for a home in the village of Walkerville, where she would be near her relatives, or she would sell and purchase a home there. This was a mere unexecuted intention, but had she done so, the house and lot received in exchange, or the proceeds of the sale, would have been exempt during the transition if neither exceeded the statutory limit of \$1,500. *Myers v. Weaver*, 101 Mich. 477 (59 N. W. 810); *Corey v. Waldo*, 126 Mich. 706 (86 N. W. 122).

The decree of the trial court is affirmed, with costs to complainant.

STONE, C. J., and KUHN, OSTRANDER, MOORE, STEERE, BROOKE, and PERSON, JJ., concurred.

CADY *v.* DOXTATOR.

1. EVIDENCE—AUTOMOBILES—PRINCIPAL AND AGENT.

In a negligence action where the plaintiff charged that defendant's servant negligently collided with and damaged his automobile, and the defendant contended that the driver was not in his employ and used the car without the consent or knowledge of such owner, evidence was admissible to show that the defendant had in a previous suit against plaintiff for the same collision averred in his declaration that he, by his agent or servant, was in charge of the car when the collision took place.

2. SAME—ADMISSIONS—IMPEACHMENT—DISTINCTION.

It was also competent to show as an admission that the defendant testified on the previous trial that the driver was in his employ and the evidence was not necessarily impeaching testimony such as would require the laying of a foundation to impeach the party testifying.

3. SAME—AGENCY—DIRECTING VERDICT.

And the evidence conflicting, the question of agency was one of fact and the trial court properly refused to direct a verdict for defendant.

Error to Wayne; Hally, J. Submitted June 15, 1916.
(Docket No. 136.) Decided September 26, 1916.

Case by Guy B. Cady against Charles H. Doxtator and another for damage to plaintiff's automobile. Judgment for plaintiff. Defendant brings error. Affirmed.

W. C. Gottman, for appellant.

Louis C. Wurzer, for appellee.

BIRD, J. On Sunday evening, November 8, 1914, plaintiff's automobile was standing in front of his residence in the city of Detroit. While in that position it was run into and damaged by defendant Doxtator's automobile. Doxtator was not with his automobile at the time. It was being driven by his brother-in-law, Harry Benzing, who resided with him, and was in his employ, and who is also made a defendant. It is the claim of defendant Doxtator that defendant Benzing was at the time driving his automobile without his knowledge or consent. Judgment having passed against the defendant in both the justice's and circuit courts, defendant Doxtator assigns error. The questions which he raises are those relating to the authority of his brother-in-law to possession of the car on the occasion in question.

1. To establish the liability of defendant Duxtator, plaintiff offered the declaration in a previous case in which Duxtator sued him for damages to his car on account of the same accident, alleging that Cady was remiss in his statutory duty to maintain lights on his car. The portion of the declaration which was admitted over defendants' objection is as follows:

"By means and in consequence of which wrongful and negligent acts of said defendant afterwards, to wit, upon the night of, to wit, the 8th day of November, 1914, while the said plaintiff by his agent and servant was in the lawful possession of said car, the said plaintiff was a lawful traveler by motor vehicle, to wit, an automobile, belonging to the said plaintiff upon the said street," etc.

The admission of this pleading is urged as error, because the former action was brought under the city ordinance, and therefore was immaterial.

The case in which the declaration was filed was between the same parties, concerning the same subject-matter, and involving the same controversy as to which party was at fault for the collision. Under the general rule this pleading was properly received as an admission, if it can be said that Duxtator, on whose behalf it was made, directed it to be made, or afterwards sanctioned it. 1 R. C. L. p. 499. We must presume that Duxtator sanctioned the statements contained in the allegation, as he testified in that trial in support of them. No error was committed in receiving it.

2. Plaintiff also produced several witnesses who were present at the former trial, and showed by them that defendant Duxtator, who was the plaintiff therein, testified that Benzing was driving his car with his knowledge and consent, and as his agent and servant. This testimony was admitted over defendant's objection that said "testimony could only be admitted as impeaching evidence." Duxtator was at the time giv-

ing testimony in his own behalf, and was a party to the record, and is also a party to this suit. The testimony was offered as an admission. As such it was admissible (*Merrill v. Leisenring*, 166 Mich. 219 [131 N. W. 538]); and it was unnecessary to lay the foundation for an impeachment before showing it. *Churchill v. White*, 58 Neb. 22 (78 N. W. 369, 76 Am. St. Rep. 64); *Owens v. Railroad Co.*, 95 Mo. 169 (8 S. W. 350, 6 Am. St. Rep. 39); *Bullard v. Bullard*, 112 Iowa, 423 (84 N. W. 513).

The rule counsel contends for is applicable where it is sought to show that a witness made previous inconsistent statements, but it has no application where it is sought to show admissions by the parties to the record.

We are of the opinion that no construction of the statute is necessary. The question as to whether Benzing was operating the car at the time with Doxtator's knowledge and consent was purely a question of fact, and under the testimony was very properly submitted to the jury.

The judgment of the trial court is affirmed, with costs to the plaintiff.

STONE, C. J., and KUHN, OSTRANDER, MOORE, STEERE, BROOKE, and PERSON, JJ., concurred.

WALKER v. BRITTON.

DAMAGES—INSUFFICIENT VERDICT—NOMINAL DAMAGES.

Where a verdict was found for plaintiff, who charged that defendant negligently drove his automobile against plaintiff, and the plaintiff therefore was held not guilty of contributory negligence, and where plaintiff, who was a music teacher, was injured so that she was unable to follow her profession as a teacher of music for about six months, six cents damages was inadequate and contrary to the weight of the evidence, requiring a new trial in plaintiff's behalf, on error.

Error to Kent; Smith, Clement, J., presiding. Submitted April 11, 1916. (Docket No. 68.) Decided September 26, 1916.

Case by Georgia Walker against William Britton for personal injuries. Judgment for plaintiff for an inadequate amount. Plaintiff brings error. Reversed.

Hatch, McAllister & Raymond, for appellant.

H. Monroe Dunham and *John M. Dunham*, for appellee.

BIRD, J. While plaintiff was driving upon the highway in the early evening, defendant ran his automobile against her carriage, and as a consequence she was thrown out and injured. She charged the defendant with negligence, because of unreasonable speed, because he failed to turn to the right of the traveled way, and because his lights were insufficient to comply with the statute. The case was submitted to the jury, who, after deliberating for a time, returned a verdict of six cents and costs. The trial court refused to accept the verdict, and said to them in part:

"Now, gentlemen, I do not think that you can render a verdict like that for this reason: You render a verdict of six cents. A verdict for six cents did not carry costs. Now, if you are going to add anything to this woman's damages, you have got to do it in dollars and cents. If I take your verdict, it means six cents. She would not recover costs. She not only would not recover costs, but the plaintiff (defendant) would recover costs against her. Now, if you want to render a verdict for six cents, it is up to you; but, if you think it would carry costs, you would be mistaken, and consequently there would be in a sense a miscarriage of justice. * * * I think I will have you go back."

The jury again deliberated for a time, and returned a verdict for plaintiff of six cents. A new trial was asked upon the ground that the verdict was against the great weight of the evidence, because it was a compromise verdict, and because the damages allowed were grossly inadequate under the undisputed evidence in the case. The trial court denied this application, and, among his reasons for so doing, said:

"The verdict is, in effect, one of 'Not guilty'; and had such a verdict been rendered under the proofs, I would not have disturbed it."

The defendant was a very frank witness. His own account of the collision furnished the jury a basis for finding him guilty of negligence. As a result of the collision, plaintiff was thrown to the ground and injured to the extent that she was unable to follow her profession as a music teacher from the date of the accident, November 13th, until the following June. By their verdict the jury found defendant guilty of negligence, and they must necessarily have found, under the instructions of the court, that plaintiff was free from contributory negligence. This being true, the remaining consideration for the jury was the assessment of plaintiff's damages. The uncontradicted testimony shows that she was entitled to substantial damages. It will

hardly do to say that the verdict was equivalent to a verdict of "Not guilty." It possibly may have been in dollars, but not in law. There is this difference: A six cent verdict fixes upon defendant the responsibility for the collision. A verdict of "Not guilty" exonerates him therefrom. The trial court explained to the jury in detail what their duties were in the premises, and opened the way for them to find that defendant was without fault, but they persisted in finding him guilty, and they should have followed that finding by an allowance of some reasonable compensation for what she had lost and suffered by reason of that negligence. The sum allowed is so grossly inadequate, and bears so little relation to what was shown to have been plaintiff's actual damages, that the verdict should have been set aside on the ground that it was clearly against the weight of the evidence. *Kilmer v. Parrish*, 144 Ill. App. 270; *Fleming v. Gemein*, 168 Mich. 541 (134 N. W. 969, 39 L. R. A. [N. S.] 315).

For failure of the trial court to set the verdict aside, the judgment must be reversed, and a new trial ordered. Plaintiff will recover her costs.

STONE, C. J., and KUHN, OSTRANDER, MOORE, STEERE, BROOKE, and PERSON, JJ., concurred.

STEKETEE v. WATERS.

1. CARRIERS—RAILROADS—NEGLIGENCE—ALIGHTING.

The authorities are uniform in holding that aged or infirm passengers are entitled to more attention and care from the carrier than others and the carrier is bound to exercise a degree of care commensurate with their condition or infirmities.

2. SAME—EVIDENCE—NEGLIGENCE.

Held, under the testimony in plaintiff's behalf, in an action for defendants' failure to help plaintiff from the car, in a duly careful manner, that the determination of the jury that defendants were negligent is sustained.

3. SAME—CONTRIBUTORY NEGLIGENCE—NOTICE.

Where plaintiff did not inform defendants' servants that she was an invalid and would require a stool to step on in alighting from the train, until she stood on the bottom step of the car, ready to alight, it cannot be said that she was guilty of contributory negligence, as matter of law, even though she was familiar with the conditions at the depot.

4. PLEADING—VARIANCE—AMENDMENT—DISCRETION.

There was no abuse of the court's discretion in permitting an amendment of plaintiff's declaration, after the proofs were in, by inserting the word "conductor" following the word "brakeman," and further amending by stating that as plaintiff was on the steps and about to alight from the train she informed the defendants' brakeman or conductor that she could not alight unless a step was furnished because she had recently undergone an operation, where the notice was given to either the brakeman or conductor and both were sworn upon the trial, and no claim was made by defendants that they were surprised.

Error to Ottawa; Cross, J. Submitted June 23, 1916. (Docket No. 55.) Decided September 26, 1916.

Case by Alida Steketee against Dudley E. Waters, Frank W. Blair, and Paul H. King, receivers of the Pere Marquette Railroad Company, for personal injuries. Judgment for plaintiff. Defendants bring error. Affirmed.

Parker, Shields & Brown and *Charles E. Ward*, for appellants.

Smedley & Linsey, for appellee.

In October, 1913, the plaintiff, a married woman 43 years of age residing at Holland, went to Evart, Mich., for the purpose of having an operation performed by one Dr. Hooverter. She had given birth to two children, and since the birth of her second child had experienced some female trouble. To obtain relief from this trouble she sought the help of Dr. Hooverter, and after the operation was confined to her bed for three weeks. On November 18th, accompanied by her husband, she returned to the city of Holland. On her return trip she drove from her brother's home in Evart to the depot in a surrey with a low step. A little stool was used for her to get into and out of the carriage, and the same stool was used in mounting the steps of the Pere Marquette train which she took from Evart to Reed City. The trip necessitated change of cars at Reed City and Grand Rapids. At Reed City the distance between the platform and the last step of the coach was five inches, and at Grand Rapids on the Pere Marquette Railroad between three and four inches, and on the Grand Rapids & Indiana Railroad between four and five inches. It is the plaintiff's claim that in alighting from defendant's train at Holland, because of the negligence of employees of the defendant, she received injuries which caused her operation to become undone, and that some time afterwards she

returned to Evart and there underwent a second operation by the same surgeon identical with the first.

In addition to the mail and baggage cars, the train in question was composed of two day coaches and a parlor car. The parlor car was equipped with an extra step, but the day coaches were not. It was shown by measurements that the distance from the bottom step of the coach in which plaintiff rode to the platform was sixteen and a half inches.

The two following special questions were submitted to the jury, and were both answered by them in the affirmative.

"(1) Were the defendants guilty of negligence in failing to furnish plaintiff a step?

"(2) Were the defendants negligent in the manner in which the conductor or brakeman assisted plaintiff off of the car?"

The trial resulted in a verdict in favor of the plaintiff for \$1,500.

It is now urged by counsel for defendants that the judgment entered should be set aside and reversed because it appears:

(1) That the defendants were not guilty of any negligence.

(2) That the plaintiff was guilty of contributory negligence as a matter of law.

(3) That there was a fatal variance between the pleadings and the proofs.

(4) That the trial judge erred in the charge to the jury as given.

KUHN, J. (*after stating the facts*). There is no claim made by counsel for the plaintiff that it was negligence on the part of the railroad company to run a passenger car the last step of which is 16½ inches above the ground or platform at a station. Plaintiff's claim as to how the accident happened was thus stated by the learned trial judge in his charge to the jury:

"Plaintiff further claims as she was about to alight from the train at the place where the train stopped at Holland she informed the defendants' brakeman or conductor that she had recently undergone an operation, and that it would be necessary for defendants' brakeman or conductor to furnish a stool or step to be placed upon the ground beneath the steps of the passenger coach so she would not be compelled to take an unreasonably lengthy step in order to reach the ground, because of her condition, and that it would be necessary for defendants' brakeman or conductor to assist her in alighting from the train. Plaintiff further claims that after said brakeman or conductor had been requested to furnish the step or stool, and while plaintiff's husband was in the act of setting down their suit cases upon the ground so as to be in position to assist her to alight, and while she was standing upon the step of the coach, said brakeman or conductor suddenly and without warning to her took hold of her person in a careless and negligent manner, pulled her off the step of the coach, thus causing her to take a long step from the step of the coach to the ground, and this long step, with the sudden pulling or jerking of said brakeman or conductor, caused the whole operation to be undone, and made it necessary for plaintiff to again submit to another operation, which caused her a great deal of pain and suffering, as described by her and her witnesses upon the stand. Plaintiff therefore claims: *First*, that it was the duty of the defendants to furnish her a safe and convenient method of alighting from said train, and that because of her condition, and because she informed defendants' brakeman or conductor of her condition, and because of the distance of the step of the coach to the ground was greater than she could safely step, defendants should have furnished her a stool or step from which she could step from there to the ground; *second*, that it was the further duty of defendants' brakeman or conductor while attempting to assist her in alighting to do so in a careful and prudent manner, and not to suddenly pull her from the step."

The jury in answering the second special question found that the company was negligent because of the

manner in which the conductor or brakeman assisted the plaintiff off of the car. It is urged by defendants' counsel that there was not sufficient evidence in the record to sustain this finding, and that a fair construction of all plaintiff's testimony shows that the railroad employee assisted her to alight with great care. The plaintiff while on the witness stand testified in part as follows:

"Q. As you started to get off the step what took place?

"A. I got down to the bottom step. I saw I could not step that high step, and I said I could not step that.

"Q. Who did you say it to?

"A. I said I must have a step.

"Q. What did he say?

"A. He said he could help me. I said, 'No,' I could not be lifted, because I had gone through what I had; I had the operation.

"Q. Did you tell him that?

"A. Yes.

"Q. And then what did he say?

"A. He said he would help me.

"Q. What did you say?

"A. Of course, I don't remember everything, it went so quick, but I said I should have a step.

"Q. Then what happened?

"A. He took hold of me and pulled me carelessly off of there, and it hurt me, and hurt me awful, and I said so to Mr. Steketee afterwards.

"Q. When he pulled you, what happened to you?

"A. It hurt me.

"Q. What happened to your feet?

"A. I had to step that step.

"Q. Why? Why did you have to step that step?

"A. That was the only thing I could do.

"Q. Was it because he had hold of you pulling you?

"A. Why, yes.

"Q. Go on and tell why you had to take that step; where did he have hold of you?

"A. He took hold of my arm.

"Q. And then what did he do?

"A. Tried to help me down there and the step, of

course, was too much—rather pulled me like, and, of course, I felt the hurt. (Continuing.) I felt the hurt at the time I was taken off. When he took hold of my arm I had to step with one foot first. It was about 19 inches to the ground. I didn't know how far it was just then; of course knew it was an awful high step. It was a high step for a well person. As he got me down I didn't say anything particular to him; I said it hurt me awful."

The authorities seem to be uniform in holding that in the case of a sick, aged, or otherwise infirm passenger the carrier should exercise a degree of care commensurate with the responsibility assumed, which would be such care as would be reasonably necessary to protect him in view of his condition. 2 Hutchinson on Carriers (3d Ed.), p. 1140; 6 Cyc. p. 598; 2 Moore on Carriers (2d Ed.), p. 1250; *Croom v. Railway*, 52 Minn. 296 (53 N. W. 1128, 18 L. R. A. 602, 38 Am. St. Rep. 557); 4 R. C. L. p. 1160, par. 594.

Whether or not the defendant upon this record failed to perform its duty was a question which in our opinion was properly submitted to the jury. The jury having affirmatively determined in answer to the special interrogatory that the company was negligent in the manner of helping the plaintiff off of the car, which determination, we think, finds support in the evidence, it will be unnecessary to consider the other question of negligence relied upon by the plaintiff.

Neither are we of the opinion that it can be said that the plaintiff was guilty of contributory negligence as a matter of law. It is urged that it appears she was familiar with the conditions at the depot at Holland, and that neither she nor her husband gave any notice to the conductor or any member of the train crew of her physical condition, or made any request to be furnished with a stool at Holland until she was on the last step of the car and in the act of stepping off. It may be true that the distance between the step and

the platform had not impressed itself upon her mind while she was well, and undoubtedly she did not realize the distance until she stood on the last step and was about to alight. It does not appear that she got off of the car voluntarily, and when it became evident to her that taking the long step might possibly do her injury she had a right to hesitate and state her reasons for not alighting to the employee who was there to assist her.

The variance between the pleadings and proofs relied upon relates to the time and place of giving defendants' employees notice of the plaintiff's condition. With reference to this amendment, which was asked for and allowed after the proofs were in, the following occurred:

"Thereupon counsel for plaintiff moved 'to amend the declaration at these places where it says the brakeman by inserting the word "conductor" following the word "brakeman," and further, on page 3, the second paragraph from the top, I wish to amend by stating that as plaintiff was upon the steps and about to alight from the train she informed the said defendants' brakeman or conductor that she could not alight from the step without having a step furnished because she has recently undergone an operation.'

"*Mr. Diekema*: We object to the motion being made at this time when the proofs are all in and the case has been closed.

"*The Court*: I think the amendment may be made."

The notice given by plaintiff was either to the defendants' brakeman or conductor, and both of these witnesses were sworn upon the trial of the case and were present in the courtroom. It was not claimed by defendants' counsel that they were surprised and could not meet the issue raised by this amendment, and we cannot say that the court abused its discretion in permitting the amendment to be made.

Careful reading of the court's charge is satisfying

that the issue presented was fairly submitted to the jury with proper legal instructions, and no prejudicial error was committed by the court therein.

We are unable to find any reason for disturbing the judgment of the court below, and it will therefore be affirmed.

STONE, C. J., and OSTRANDER, BIRD, MOORE, STEERE, BROOKE, and PERSON, JJ., concurred.

GALINSKI v. CITY OF DETROIT.

1. ADVERSE POSSESSION—PRIVATE WAY—HIGHWAYS AND STREETS.

It is the general rule that use by permission of a private way cannot convert it into a public way.

2. SAME—TAXATION.

Where a city lot has not been occupied by any one, and has been used by adjoining owners as a court, and improved as such, with the apparent acquiescence of the original owners, there has been no such actual possession by the original owners or their grantees as to establish title by adverse possession as against a city claiming under a sale for city taxes.

Appeal from Wayne; Hosmer, J. Submitted June 14, 1916. (Docket No. 122.) Decided September 26, 1916.

Bill by Frank Galinski and others against the city of Detroit and Max Koch, city treasurer, to quiet title to certain land. From a decree dismissing the bill, complainants appeal. Affirmed.

William C. Gottman, for complainants.

Walter Barlow (*Harry J. Dingeman*, of counsel),
for defendants.

OSTRANDER, J. Complainants, whose bill was filed in December, 1913, charge that they are owners of a parcel of land, which is described, and have been such owners "for days now last past," and that the land is worth \$1,000 and more. The evidence of their title is a quitclaim deed which, desiring to have recorded, they presented to the city treasurer of Detroit in accordance with Act No. 472, Local Acts of 1901, chap. 10, § 10, with a request that he certify thereon that all city taxes and special assessments on said premises had been paid. This the said treasurer refused to do, exhibiting a book of "Land Sold for Taxes," in which it appeared that the premises had been sold by successive city treasurers, beginning with the year 1886, and each year thereafter, to and including the year 1912, to the city of Detroit for city taxes and for certain special assessments, for the terms of 99 years. They charge, further, that they are in actual possession of the premises, and that from May 25, 1885, to the time of filing the bill of complaint they or their grantors have at all times been in the actual, continuous, notorious, distinct, hostile, and exclusive possession of the premises; that therefore all right, title, and interest in said city of Detroit through such sales are barred, avoided, and made of no effect. It is charged, further, that, excepting three described special assessments, there are no other unpaid assessments, and no city taxes on or against the premises; that the city proposes to issue a tax lease or leases for a period of 99 years to some person or persons unknown; and that the city of Detroit sets up title to the premises based upon tax sales. The relief prayed

for is that the city of Detroit and its treasurer answer the bill; that the said several special assessment rolls and sales by city treasurers be decreed to be barred, avoided, and of no effect, and the premises be discharged from the apparent cloud upon the title; that the city of Detroit be decreed to release to complainants all of its apparent right and interest and the city treasurers be ordered to certify, as requested, that there are no outstanding taxes or assessments. The city and its treasurer joined in an answer, there was a replication, hearing, and a decree dismissing the bill.

In the answer it is asserted that the premises in question belong to the city by virtue of the said several tax sales; the total of taxes and special assessments laid and unpaid amounting to \$972.22, the land having never been redeemed from such sale, nor the taxes and assessments paid. It is alleged, also, that in platting the original premises, of which lot 19 in question here was a part, and as said platted premises were afterwards sold by the owner and built upon and used by various purchasers of parts thereof, lot 19 became in fact a private way, a roadway, improved and used as such, called and known as "Davis Place." They allege that neither complainants nor their grantors have had adverse, or any actual, possession of the premises, and that the land has never been occupied since the year 1885 except as a private court for the purposes of adjacent owners and by public improvements made upon the premises to permit owners of dwellings fronting on said court to use the same, and that the original owners, complainants' grantors, abandoned the premises to be used as a private court.

Complainants' theory appears to be that after a sale of land to the city for taxes and the expiration of the redemption period, the title vests in the city, the lien for taxes being merged in the title; that the title thus

acquired may be lost by adverse possession, and that the city has, therefore, no lien for unpaid taxes against this property and the treasurer should have so certified; that in this case the certificate should be given and the title should also be quieted. See *Gray v. City of Detroit*, 113 Mich. 657 (71 N. W. 1107); *Schneider v. City of Detroit*, 135 Mich. 570 (98 N. W. 258); *Cass Farm Co. v. City of Detroit*, 139 Mich. 318 (102 N. W. 848); *Klatt v. City of Detroit*, 162 Mich. 186 (127 N. W. 409).

The bill and proofs show certain assessments for which the land has not been sold; and, unless it is held that the land was not liable to the assessments, this alone affords reason for refusing the treasurer's certificate. And unless it is held that after the first sale and failure to redeem and, in consequence thereof, the premises were no longer liable to be taxed because they were city property, it is not perceived how the possession of complainants, assuming that it has been adverse to the city, has continued for a period long enough to toll the statute of limitations relied upon. But there is a serious objection, going to all of the relief claimed by complainants. While it appears that the complainants have acquired a quitclaim deed to the premises from the original owners, who platted the land and adjoining land, it also appears that the particular lot has not been occupied by any one, and has been used by adjoining owners and fitted for such use by improvement as a way or place, fronting which residences were erected, a use apparently acquiesced in by the owners of the original title. It is the general rule that use by permission of a private way cannot convert it into a public way, and there is no evidence that the owner of this land ever dedicated the land to the public. The evidence is, however, that the city has, to some extent, recognized the land as a way, or

place, and, it being unoccupied, had no occasion to begin proceedings to eject or oust any private owner, none such appearing to have asserted a right to occupy. There has been no occupancy by one claiming the right, and no possession except such theoretical possession as runs with the title. Such a theoretical possession of the land may be as well claimed by the city as by complainants and their grantors. It will be assumed that when complainants, or some one else claiming the right to do so, actually occupies the premises, the city will begin proper legal proceedings to try title, or adjoining owners, who by the testimony appear to be interested, will take proceedings to establish such rights as they assert.

The complainants' claim of a title by possession adverse to the title of the city is not sustained, and for this reason the decree dismissing the bill was right, and is affirmed with costs to appellees. Dismissal of the bill, however, is without prejudice to the right to institute such proceedings at law as may be advised.

STONE, C. J., and KUHN, BIRD, MOORE, STEERE, BROOKE, and PERSON, JJ., concurred.

WHITE v. MCKENZIE.

1. APPEAL AND ERROR—DIRECTED VERDICT.

Upon appeal from a directed verdict, plaintiff is entitled to have his testimony viewed most favorably to himself, but he is not entitled to a construction of it opposed to its reasonable significance.

2. TRUSTS—PAROL CONTRACT—RESULTING TRUST—EXPRESS TRUST—STATUTE OF FRAUDS.

Where defendant orally agreed with plaintiff and an associate to furnish the purchase price of certain real estate, taking title in defendant's name, and all three were to make an effort to sell at a profit, which was to be divided equally among them after allowing defendant \$200 for the use of his money, there was no resulting trust, and no other trust could exist without a written agreement.

Error to Wayne; Hosmer, J. Submitted June 16, 1916. (Docket No. 144.) Decided September 26, 1916.

Assumpsit by William White against William McKenzie for money had and received. Judgment for defendant on a directed verdict. Plaintiff brings error. Affirmed.

Thomas A. Conlon, for appellant.

Watson, Safford & Shepherd, for appellee.

OSTRANDER, J. Plaintiff rested his case, and the court directed a verdict for defendant. The court was of opinion that the testimony for plaintiff tended to prove a parol contract, or agreement, for an interest in lands—a contract not enforceable unless in writing—and that in any event the suit was prematurely instituted.

The declaration, which concludes with the common counts in assumpsit, contains a special count. In the

special count, as amended, plaintiff alleges, in substance and effect, that he and another found for sale certain real estate in the city of Detroit which they brought to the attention of defendant, who agreed with plaintiff and his associate to purchase the property from the owner for \$8,800. The property was incumbered for \$5,000. A commission of \$132 was received from the owner for making the sale, and was divided equally between plaintiff, his associate, and defendant. Defendant had and furnished \$3,800 of the purchase money, was to have \$200 for the use of his money, the title was taken in his (defendant's) name, and plaintiff, his associate, and defendant were to each make an effort to sell the property for more than \$9,000, dividing equally between them any sum more than \$9,000 received for the property, and dividing the rents received therefrom pending the sale. It is alleged that defendant sold the property for \$10,500, and collected in rents therefrom \$900. In his bill of particulars plaintiff claims a one-third interest in the profits made on the sale, \$500, one-third rents, as per agreement, \$300, for advertising, \$15, interest on \$500 from the time defendant sold the property, and interest upon \$300 rent collected by defendant. The plea is the general issue. When the motion for a directed verdict was made, one ground of the motion being that the contract proven was not the contract alleged in the declaration, counsel for plaintiff said: "We are proceeding entirely on the common counts in this declaration."

Plaintiff upon this appeal, and upon the merits—I think there is no occasion to discuss any point save the one that his agreement is not enforceable—is entitled to have his testimony viewed most favorably to himself. He is not entitled to a construction of it opposed to its reasonable significance. He described upon direct and cross-examination what the parties

said and what they did. Without setting out the testimony, its substance is that plaintiff and his associate learned that certain productive property was for sale. At the price asked for it they believed it could be resold, in a short time, at a profit, and that the accruing rents would carry the property after the original payment of purchase money was made. There was also a certainty, at least a chance, that if they could find a buyer they could get a commission from the owner if a sale was made. They took the matter up with defendant, talked with him, and with him examined the property. The owner's price was \$9,000 and the property was mortgaged for \$5,000. The owner agreed to take and did take \$8,800 for the property, deeding it to defendant. Why defendant should purchase the property at the owner's price and agree to divide the profits, if it was sold at a profit, with plaintiff and his associate, no limit of time of sale or price being fixed, is not well explained, unless they purchased it on joint account, each, as between themselves, having an interest in the property, and were to later agree as to the length of time it should be held and the price at which it should be resold. The mortgage plaintiff learned would be due in the fall or winter following the purchase. The deed was made about July 1, 1913. The rents, if it was all of it continuously rented at the prices fixed by the owner, were about \$150 a month. The mortgage debt drew interest, and the property was, of course, liable to taxation. It might never be sold for more than it cost. Plaintiff at various times and in varying language testified to the agreement which was made:

"I will take \$200 for the use of my money, and we will divide all the profits above \$9,000 between the three of us," is one statement.

"He said we will all try to sell the property, and when it is sold we will divide the profits," is another statement.

"The agreement was that it did not make any difference whether the property was sold the next day or how long it might be before it was sold; that Mr. McKenzie was to have \$200 for the use of his \$3,800 during the time that it was tied up in this property.

* * *

"Q. What was said as to how the rent would carry the property along?

"A. Simply that we would divide the profits on the property—the income and the outgo at the time the deal was completed.

"Q. I want to know what was said between you men with respect to the rent that that property would bring, carrying the property along.

"A. Why simply that the property had that rental on it, and that we would sell it, and when we would sell it we would divide the profits on it.

"Q. Do you mean to say that it was included in your agreement that you should have one-third of the rent the property brought in, Mr. Welch one-third. and Mr. McKenzie one-third?

"A. That is the understanding.

"Q. That was the agreement?

"A. Yes, sir."

This testimony, given by plaintiff, is somewhat varied by the following:

"Mr. McKenzie said that he would make the proposition of \$8,800 for that property. He would take \$200 for the use of his money, and that we would sell it for all we could above \$9,000 and divide the profits on the deal.

"Q. And that was all that was said?

"A. That was the proposition *in toto*; Mr. McKenzie was to pay the taxes.

"Q. What was said about that?

"A. Why he would take care of those things when they came along.

"Q. Did he say that?

"A. I believe so; I won't swear to that absolutely.
* * * I don't recall any conversation as to who should pay the interest on the outstanding mortgage of \$5,000. There was nothing said at all as to who should pay the upkeep of the property."

Plaintiff's associate, Mr. Welch, gave testimony to the effect that he took defendant to look at the property which he was trying to sell for the owner, and which could be purchased for \$9,000.

"McKenzie says we would take the property for \$9,000. We would divide any profits over \$9,000, and I ought to have the \$200 for the use of my money.

"Q. What money?

"A. Well, whatever he would have to put in.

"Q. How much would he have to put in to swing the deal?

"A. Well, there was a mortgage of \$5,000 on the property, and that would necessitate the \$3,800, and so, of course, he would have to take care of that; whatever arrangements he could make they were satisfactory to us; we did not care.

"Q. And then he said that all over and above \$9,000 that the property was disposed of or sold for, what would be done with that?

"A. And when it was sold we were to share thirds in the profits above the \$9,000. * * *

"Q. As between you three men it was a joint proposition?

"A. To share equally in the profits made, except that Mr. McKenzie was to have the \$200 for the use of his money.

"Q. That is correct, is it?

"A. We were to share in the profits.

"Q. Just answer that 'Yes' or 'No,' please; that is the only answer that question calls for.

"A. Oh, I suppose that is so; yes, sir.

"Q. That was your understanding of it at least?

"A. Yes, sir."

There can be no reasonable doubt, I think, that the plaintiff's case, vague as it is, amounts to no more than this, that by voluntary agreement title to the land was placed in defendant, with a parol understanding how he should hold it. He was to hold it for sale at a profit for joint account. The rentals to accrue from it were to be used at least to maintain it. An ac-

counting for rents and compelling defendant to sell at a reasonable profit within a reasonable time were rights attaching to the agreement testified to. There was and could be no resulting trust. No other trust could exist without a written agreement. *Pulford v. Morton*, 62 Mich. 25 (28 N. W. 716); *Tuttle v. Bristol*, 142 Mich. 148 (105 N. W. 145); *Nester v. Sullivan*, 147 Mich. 493 (111 N. W. 85, 1033, 9 L. R. A. (N. S.) 1106).

The judgment is affirmed, with costs to appellee.

STONE, C. J., and KUHN, BIRD, MOORE, STEERE, BROOKE, and PERSON, JJ., concurred.

SAGE v. WYANDOTTE TERMINAL RAILROAD CO.

MASTER AND SERVANT — PERSONAL INJURIES — NEGLIGENCE — SAFE PLACE — DIRECTED VERDICT.

Where a switchman was injured by being crushed between the jamb of a door and a car which was wider than those he had been accustomed to handle, in the absence of testimony that he supposed all the cars handled by his crew were of one width, or any excuse for failure to observe that cars were of unequal width, it being common knowledge that freight cars are of different dimensions, defendant railroad company was not negligent in failing to notify plaintiff that the car in question was wider than the cars he had been handling.

Error to Wayne; Van Zile, J. Submitted June 14, 1916. (Docket No. 19.) Decided September 26, 1916.

Case by Allen Sage against the Wyandotte Terminal Railroad Company for personal injuries. Judgment for defendant on a directed verdict. Plaintiff brings error. Affirmed.

Maxwell W. Benjamin, for appellant.

Gray & Gray and *J. Walter Dohany*, for appellee.

OSTRANDER, J. Plaintiff had worked for defendant as night switchman for 24 days when he was injured. One of the duties of the night crew, of which plaintiff was one, was to bring from the shipping room of the Michigan Alkali Company, every night, a car loaded with soda ash and spot the car in a shed or building of the J. B. Ford Company. At both plants the tracks ran through doors, with scant clearance between the rails and the door jambs; there were no doors at the alkali plant, there were doors at the Ford plant, and the opening or doorway there was smaller. Within plaintiff's experience the engine had handled only the single loaded car at the Ford plant previous to the night when he was injured, and in spotting the car he rode into the shed, occupying a place on the footboard of the engine, from which, the signal that the car was in position being received, he uncoupled the car and engine. Upon the particular occasion, on the journey to the Ford plant, a coal car had been found in the way and placed between the engine and the soda ash car. The building was dark, another switchman went in to spot the car and give signals, and plaintiff took up a position on the ground near the door jamb to take the signals of the other switchman and report them to the engineman. The soda ash car passed him. The coal car was wider than the soda ash car, and plaintiff was hit by it and squeezed between it and the jamb of the door. Nothing about the premises, or the cars, was defective or out of repair, nor was there

any want of care in operating the train. Except for the extra car the conditions had existed for some six years. But plaintiff alleges his ignorance of the hazards of the situation, the failure of defendant to advise him about them and how to avoid them, and the failure to provide him a reasonably safe place in which to work. As his testimony convincingly shows, the plaintiff misapprehended nothing unless it was the width of the second car. It, in fact, used some three inches more of the clearance space than the soda ash or first car did. Plaintiff made use of the clearance space, not to pass through it, but to look through it from outside the building. The movement of the engine was controlled by him. He took up his position with reference to the passing cars, and no instructions could have added to what his intelligence made evident. The cars were being moved very slowly. He intended that they should pass him. If the first or soda ash car had been the wider, he would have behaved no differently. He would have seen to it that it passed him without striking him. His calculations were wrong only because the second car was wider than the first. This is the single fact, unappreciated, he says, unprovided for, to which his injury may be ascribed. Although he says he did not know the exact clearance—it was night, and he had worked only at night—still, upon analysis, and as relating to his injury, the foregoing is the effect, the substance, of his testimony. If, therefore, defendant was negligent in a way which caused or contributed to the injury, it was in neglecting to advise him that the cars moved by it were not all of them of equal width.

I do not find that he alleges or offered testimony tending to prove that he supposed that all the cars handled during the night by his crew were of one width, or any excuse given for failure to observe whether the cars were of unequal width. Knowledge

that freight cars are of different dimensions is very common, so common that I think it was no violation of defendant's duty to fail to call plaintiff's attention to the fact. The learned trial judge was of opinion that no negligence of defendant had been proven, and with this conclusion I agree.

The judgment is affirmed, with costs to appellee.

STONE, C. J., and KUHN, BIRD, MOORE, STEERE, BROOKE, and PERSON, JJ., concurred.

HURLEY v. SELDEN-BRECK CONSTRUCTION CO.

MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW—HERNIA CAUSED BY PARTICULAR STRAIN.

Where claimant's husband, a brick mason in defendant's employ, suffered an injury while lifting a terra cotta window sill into place, and strangulated hernia resulted, which caused his death later, after two operations, claimant was entitled to compensation under the workmen's compensation law (Act No. 10, Extra Session 1912, 2 Comp. Laws 1915, § 5423 *et seq.*), and the presence of a structural weakness or actual pain, antedating the injury, in the region affected, would not preclude recovery if the injury itself was distinct and the result of a particular strain. *Bell v. Hayes-Ionta Co.*, 192 Mich. 90.

Certiorari to Industrial Accident Board. Submitted June 12, 1916. (Docket No. 35.) Decided September 26, 1916.

Annie Hurley presented her claim against the Selden-Breck Construction Company for compensation

for injuries to her husband causing his death while in defendant's employ. From an order awarding compensation, defendant brings certiorari. Affirmed.

Frederick T. Witmire, for appellant.

Howard B. Bloomer and *Seth J. Wicker*, for appellee.

OSTRANDER, J. The facts found by the Industrial Accident Board are stated as follows:

"(1) On December 6, 1913, Arthur Hurley, the deceased husband of claimant, Anna Hurley, was in the employ of the Selden-Breck Construction Company, a corporation, which said company was erecting a building for the Ford Motor Company at Woodward avenue and the East Grand boulevard in the city of Detroit, and State of Michigan.

"(2) Arthur Hurley was by trade a brick mason, and on December 6, 1913, was laying terra cotta window sills, which, according to the custom observed in the trade of brick mason, comes under the head of brickwork.

"(3) Henry Singer, foreman in charge of the work on December 6, 1913, ordered three bricklayers, one of whom was Arthur Hurley, to lay terra cotta window sills (pieces of terra cotta 2 feet long, 18 inches wide, and 9 inches thick), and the two bricklayers, so ordered to lay terra cotta window sills with Arthur Hurley, worked together, lifting, carrying, and setting said terra cotta window sills, but Arthur Hurley, having no one to help him, was compelled to lift, carry, and set said terra cotta window sills without assistance.

"(4) Arthur Hurley was engaged in laying terra cotta window sills weighing between 75 and 80 pounds, unassisted as aforesaid, when at about the hour of 2 o'clock in the afternoon on said December 6, 1913, while lifting a terra cotta window sill on the wall, he was injured, crying out at the time and putting his hand on his back, and appeared to be in great distress, although he changed work with William J. Booth, who

was near him at the time, and finished the day laying brick, continuing until 4 o'clock in the afternoon, the usual quitting time.

"(5) The injury sustained by Arthur Hurley on said December 6, 1913, was caused by the strain of lifting terra cotta window sills, and resulted in a right oblique inguinal hernia, which became strangulated, and for which an operation was performed on Mr. Hurley on December 9, 1913, and a second operation a few days later, but Mr. Hurley's condition did not improve, and he died January 1, 1914, as a result of the injury sustained by him as aforesaid."

It is urged, as it has been in earlier cases, that Mr. Hurley suffered from a disease or from a congenital defect, the development of which, in either case, in the course of an employment, is not an accidental injury. We said, in *Robbins v. Engine Co.*, 191 Mich. 122 (157 N. W. 437), of the rule announced in *United States Accident Ass'n v. Barry*, 131 U. S. 100, 121 (9 Sup. Ct. 755), and in similar cases, that:

"It is doubtful, however, if in applying our statute, its general purpose being considered, the court should exactly follow the rules suggested and applied in the cases referred to."

In *Grove v. Paper Co.*, 184 Mich. 449 (151 N. W. 554), the strain ruptured an artery, in *La Veck v. Parke, Davis & Co.*, 190 Mich. 604 (157 N. W. 72), the exertion resulted in a cerebral hemorrhage, and in *Hills v. Wood Dish Co.*, 191 Mich. 411 (158 N. W. 214), the period of incapacity was prolonged by a pre-existing disease, and in each an award of compensation was affirmed. In *Bell v. Hayes-Ionia Co.*, 192 Mich. 90 (158 N. W. 179), it was said:

"The presence of a structural weakness or actual pain, antedating the injury alleged, in the region where the injury occurred, does not preclude a recovery if the injury itself is distinct and the result of a particular strain causing a sudden protrusion of the intestine."

The case at bar and *Bell v. Hayes-Ionia Co.*, *supra*, cannot, in principle, be distinguished. The action of the Industrial Accident Board is affirmed, with costs to claimant.

STONE, C. J., and KUHN, BIRD, MOORE, STEERE, BROOKE, and PERSON, JJ., concurred.

ROBBINS *v.* MAGOON & KIMBALL CO.

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW—DEFENSES—ASSUMPTION OF RISK—ANIMALS.

In an action for the alleged negligent death of defendant's employee, caused by the kick of a mule, where defendant had not elected to come under the provisions of the workmen's compensation law (Act No. 10, Extra Session 1912, 2 Comp. Laws 1915, § 5423 *et seq.*), the defense that plaintiff's decedent had knowledge of the vicious character of the mule and assumed the risk, is not open to defendant. Act No. 10, Extra Session 1912, pt. 1, § 1, subd. c.

2. SAME—EVIDENCE—CONJECTURE.

Held, that the evidence supported the conclusion that the cause of death was a kick by a vicious mule, as alleged.

3. EVIDENCE—OPINION EVIDENCE—VICIOUS MULE—ANIMALS.

On the issues as to whether the mule was vicious and as to whether defendant's servants knew of its alleged vicious propensities, testimony that it had a bad eye, that it kicked at witness, that witness could tell by its look that it was not a safe animal, was admissible, as disposition of animals is judged, in part, at least, by appearance and movements.

4. SAME—PHYSICIANS—SIMILAR INJURY.

Where it was plaintiff's theory that the kick of the mule injured the spleen and kidney and caused the death of

decedent, although it broke no bones and left only slight marks upon the body, evidence of a physician that such a case had occurred within his personal observation was admissible to meet the contention of defendant that the result attributed to the kick was improper because no external evidences of injury and no broken bones were found.

5. APPEAL AND ERROR—HEARSAY—EVIDENCE.

Where no objection was made in the court below that the cause of the injury in the related case was hearsay, and no motion to strike for that reason was made, the judgment will not be reversed for such alleged error, raised for the first time in this court.

6. TRIAL—ARGUMENT OF COUNSEL—CURING ERROR.

Where the court at once advised the jury that alleged improper argument of counsel should not have been made, the error, if any, was cured.

7. SAME—INSTRUCTIONS.

It was not erroneous for the court below to charge the jury that the accident naturally appealed to the sympathy; that he would not ask them to cast it aside, but to govern it by their oaths, judgment, reason, and charge of the court.

Error to Muskegon; Sullivan, J. Submitted June 19, 1916. (Docket No. 62.) Decided September 26, 1916.

Case by William A. Robbins, administrator of the estate of William J. Robbins, deceased, against the Magoon & Kimball Company for the negligent killing of plaintiff's intestate. Judgment for plaintiff. Defendant brings error. Affirmed.

Kleinhans, Knappen & Uhl, for appellant.

John G. Anderson and *Charles B. Cross*, for appellee.

OSTRANDER, J. The principal contention of appellant is that there was introduced by plaintiff no testi-

mony tending to prove the negligence of the defendant. It appears that plaintiff's intestate was employed by defendant as helper or assistant to a teamster, who was in charge of a wagon and a team of mules used in delivering ice. It is alleged that one of the mules was vicious and in the habit of kicking, and that he kicked plaintiff's intestate, inflicting injuries which resulted in his death. This was in June, in the year 1913. Knowledge that the mule was vicious and in the habit of kicking is imputed to the defendant from the fact that the teamster possessed such knowledge. Upon this proposition the controlling rule was stated and applied in a former decision in this case. 186 Mich. 672 (153 N. W. 13). The cause has again been tried, and it is now contended that, assuming that the knowledge of the teamster was possessed by the defendant, no negligence of defendant is made out, because no breach of any duty owed to plaintiff's intestate has been proven. This proposition is rested upon another proposition or rule and upon a fact. The fact is that plaintiff's intestate knew about and had been told of the alleged vicious propensity and habit of the mule; the rule or proposition is that a master is not bound to furnish absolutely safe instrumentalities for conducting his business to his servants, and, as regards a servant who fully understands the perils to which an instrumentality exposes him, it is not negligence to furnish or to continue to use such instrumentality.

The point cannot be discussed without reference to Act No. 10, Extra Session 1912, which as to this defendant, which had not elected to be governed by the act, and in this case forbids the defenses: *First*, that the employee was negligent, unless wilfully so; *second*—

“that the employee had assumed the risks inherent in or incidental to, or arising out of his employment, or

arising from the failure of the employer to provide and maintain safe premises and suitable appliances." Act No. 10, Extra Session 1912, pt. 1, § 1, subd. c (2 Comp. Laws 1915, § 5423).

Counsel for appellant assume, in the argument made, that the mule, in the defendant's business, was an appliance, or instrumentality, and that it was an unsafe and unsuitable one. They cannot, I think, resist the conclusion that it was negligence to furnish such an instrumentality, except by using, in favor of defendant, the fact that plaintiff's intestate knew that the instrumentality was unsafe. The principle deduced and stated in *Ragon v. Railway Co.*, 97 Mich. 265, 273 (56 N. W. 612, 614, 37 Am. St. Rep. 336), is "that obvious imperfections in methods or machinery, existing at the time of the employment, cannot be made the basis of a liability in favor of an employee who suffers an injury in the course of his employment, for the reason that the employer has a right to have and use imperfect methods and tools, and to ask others to enter his employ to aid him in such use, and that in so doing he does not undertake to insure the employee"—is one an element of which is an acceptance of whatever risk there is by the employee. In *McGinnis v. Bridge Co.*, 49 Mich. 466, 473 (13 N. W. 819, 821), no different principle was stated in saying that:

"When it appears the employee is aware, as the plaintiff was, of the risks to which he exposes himself in the service, and consents to encounter them, his employment subject to the risks cannot be treated as a breach of duty."

It is true that "the three principles—negligence, contributory negligence, and assumed risk—are consistent," but not identical. *Bradburn v. Railroad Co.*, 134 Mich. 575 (96 N. W. 929). But to hold that conduct which is not negligent because the employee assumes or consents, impliedly or actually, to share a

risk, is not negligent in view of the statute is to allow a defense which the statute refuses. The employer may not now safely invite the employee to share with him "the risks * * * arising from the failure of the employer to provide and maintain safe premises and suitable appliances."

It is said the cause of death is purely conjectural. There was, however, testimony supporting the conclusion that the cause of death was that alleged, namely, a kick by a vicious mule.

The principal issue of fact was whether the mule was vicious. With this went along another issue, namely, whether defendant's servant, or servants, knew of the alleged vicious propensities of the animal, of his propensity to kick, that he was a kicking mule. Witnesses said that the mule had a bad eye—a wicked look in his eye. One witness said he was afraid of the animal, but he gave as a reason for fear that the mule kicked at him, and further stated that he had refused to "hook" him up. Another witness testified that he could tell by the mule's looks that he was not a safe animal. Objections to the testimony referred to were made, and exceptions to the rulings admitting it were taken. I have regarded it as matter of common knowledge, at least among those accustomed to driving and handling horses and mules, that vicious propensities, as to bite and kick, were likely to be manifested in the general demeanor of the animals. The eyes and various movements which they make convey the impression, not always entirely reliable, that they are gentle and can be handled, or otherwise. A buyer, or one charged with handling animals, would judge disposition, in part at least, by appearance and movements, and act accordingly. The testimony objected to furnished to the jury no means of judgment other than those which ought to be and are employed in such cases.

It is plaintiff's theory that the kick of the mule, although it broke no bones and left no considerable, if any, external marks upon the body of plaintiff's decedent, injured the spleen and a kidney, and caused death. A physician, testifying for plaintiff, was permitted to say that such a case had occurred within his personal experience. It was objected that evidence of specific cases was not competent to prove the cause of injury in the particular case. It appears to have been urged that the result attributed to the kick in the case at bar could not be properly so attributed because no external evidences of injury and no broken bones were found. The experience of a medical man in a similar case ought to affect the judgment of a jury respecting such an issue. It is urged in this court that it appears from his testimony that the witness did not know that in the specific case related the injury was caused by a kick. His testimony supports the inference that the cause of the injury—the witness in that case removed the kidney of the woman—was not within his personal knowledge, but was related to him. No such objection was made in the trial court, and no motion to strike out the testimony for any such reason was made. What might have been developed, or what further testimony introduced upon such an objection being made, we cannot know. The judgment should not be reversed for any alleged error in admitting or in rejecting testimony.

The assignment of error based upon an exception to alleged improper argument of counsel for plaintiff may be passed without discussion. It is doubtful if the argument should be classed as improper, and, in any event, the court advised the jury, at once, that it was improper, and that counsel should not have made it.

In a single respect the charge of the court is criticised in the brief. The jury were told that:

"There has appeared here in the trial of this case his father and his mother, fine, estimable appearing people, naturally appealing to our sympathy. The unfortunate accident and all that appeals to our sympathy; you desire to render assistance if we might, to any one that may have lost a son. That sympathy wells up in the hearts of every human person. I would not have you cast it aside. That would be asking you to do more than you can do, but I want you to govern it, govern it by your oaths, by your judgment, by your reason, by the charge of the court."

The criticism is that its effect was "to instruct the jury to start out with their sympathies as a basis and to render assistance to the bereaved 'if we might,'" and it is claimed that sympathy is reflected in the verdict of the jury. The trial judge may have been impressed that in the circumstances it was advisable to remind the jury of their duty and their oaths, contrasting duty and sympathy, and it is quite fair, I think, to say that the language used was perhaps as effective for this purpose as could have been employed.

The case is apparently a hard one, for defendant if the judgment stands, for plaintiff if it does not stand. As the law is, no reversible error appearing, the judgment must be affirmed, with costs to appellee.

STONE, C. J., and KUHN, BIRD, MOORE, STEERE, BROOKE, and PERSON, JJ., concurred.

KINCADE v. PECK.

1. TRIAL—PLEADING—RIGHT TO OPEN AND CLOSE—CIRCUIT COURT RULE.

In a suit upon a promissory note, where defendant's counsel claimed a set-off, but neglected, by notice accompanying his plea, to waive the benefit of the general issue and admit the facts alleged in plaintiff's declaration, in compliance with Circuit Court Rule 24c, he was not entitled to open and close the case.

2. PLEADING—LIMITATION OF ACTIONS.

While the general rule is that, if relied upon, the statute of limitations must be pleaded, yet it has not been applied in such way as to prevent a plaintiff from having the advantage of the statute when a demand sought to be set off by the defendant is barred by the statute.

3. EVIDENCE—BILLS AND NOTES—SET-OFF AND RECOUPMENT.

In a suit upon a note given jointly to husband and wife for money loaned and furnished by them jointly, defendant could not show that the money, as against his creditors, really belonged to the husband alone; and advances to the husband could not be set off against said claim.

4. LIMITATION OF ACTIONS—BILLS AND NOTES—SET-OFF AND RECOUPMENT.

Where defendant loaned plaintiffs money, taking their note for one or five years, which was afterwards destroyed at their solicitation, and parol promise to pay accepted in lieu thereof, and ten years after said note was given defendant borrowed of plaintiffs \$200, and gave the note in suit, defendant's demand against plaintiffs, which matured more than six years before suit was begun, was barred by the statute of limitations.

5. TRIAL—ABSENCE OF COUNSEL—NEW BEGINNING.

Where defendant's counsel was absent from the courtroom when the court was ready to begin the trial, and, after a half hour's delay in an effort to locate counsel, a jury was called and plaintiffs permitted to make their *prima facie* case, after which court adjourned, counsel was not entitled, on the reconvening of court, to make a new be-

ginning and examine the jurors, whether his default was intentional or unintentional.

6. NEW TRIAL—DEFAULT—PREJUDICE.

Any supposed prejudicial consequences of an unintentional default must be presented, after verdict, to the trial court upon motion for new trial.

7. SAME—AFFIDAVITS—CUMULATIVE EVIDENCE—DILIGENCE.

A motion for new trial, based upon affidavits showing cumulative testimony might be produced, without showing due diligence to bring it in upon the first trial, was properly denied.

Error to Wayne; Murphy, J. Submitted June 15, 1916. (Docket No. 8.) Decided September 26, 1916.

Assumpsit in justice's court by Richard J. Kincade and another against Mary J. Peck upon a promissory note. There was judgment for plaintiffs and defendant appealed to the circuit court. Judgment for plaintiffs. Defendant brings error. Affirmed.

James H. Pound, for appellant.

Frederick E. McCain, for appellee.

OSTRANDER, J. Plaintiffs filed in justice's court the promissory note given by defendant, dated, as the record is understood, July 24, 1912, and declared upon the common counts in assumpsit. The summons was issued November 6, 1914, returnable November 19, 1914. With the plea of the general issue defendant gave notice that she would prove that the plaintiffs are indebted to her for money lent December 20, 1902, and evidenced by a note payable five years from said date, with interest at 5 per cent. per annum, which interest was paid for the years 1903 and 1904; that thereafter, at different times during the years 1906 to 1912, inclusive, "the said plaintiff borrowed money from defendant, averaging \$25 per year," all of which

demands defendant would set off against plaintiffs. Plaintiffs had judgment, defendant appealed, and on September 29, 1915, the appeal came on to be tried. A jury was called, examined by counsel for plaintiffs, counsel for defendant not being present, and sworn. The note was marked and put in evidence, and plaintiff Richard J. Kincade was sworn as a witness, and testified to a computation he had made of the sum due. At 12:20 o'clock p. m. court adjourned until 2 o'clock p. m. Counsel for defendant then appeared and asked leave to examine the jury, which, upon objection by counsel for plaintiffs, was refused. The trial proceeded, and resulted in a verdict for plaintiffs for \$240.54, the sum due upon the note. Judgment, a new trial having been refused, was entered on the verdict.

Before the cause was submitted to the jury, it was admitted that plaintiffs were entitled to recover from defendant upon the note in suit \$240.54. It was admitted that in the year 1902 plaintiffs jointly made their promissory note, running to defendant, for the sum of \$150. It is said in appellant's brief:

"The court will see by an inspection of the record that the only question in this case is: Was the \$150 note given by plaintiff to defendant Mary J. Peck ever paid? Plaintiff Richard J. Kincade swears it was. Mrs. Peck, James Kincade, the two daughters, and the witness Charles Millard give testimony to show that it was not."

But, as will at once appear, this is not the only question, nor is it the only one discussed in the brief. Whether the demand evidenced at that time by that note was a subsisting valid demand of defendant against plaintiffs was, it is true, the sole issue of fact submitted to the jury and involved, upon the testimony: (a) Whether it fell due one year or five years from its date, December 20, 1902; (b) if five years, whether plaintiffs had paid it; the jury being instruct-

ed that if it ran for one year only, it was outlawed, and could not be set off against plaintiffs' demand, and that logically, the first question to be determined by them was whether the note was given for one or for five years. In answer to special questions which counsel agreed should be submitted to them, the jury found that the note was given for one year. It is therefore apparent that the jury did not determine, and they probably did not consider, whether the note had been paid. Having found that it was given for one year, the rule given them in the charge required them to return the verdict they did return. If they were correctly instructed, and if no prejudicial ruling affecting the testimony upon this subject was made, the judgment should not, for any error committed during the trial, be set aside.

It is complained that counsel for defendant was not allowed "to open and close the case, contrary to the rule of this court applicable thereto, and which applies to the party who has the affirmative of a question. Having the opening thereon, I demanded this privilege, but was refused, most erroneously, I think." The foregoing is the substance of the argument made upon this point. If counsel refers to Circuit Court Rule 24, subd. "c," the objection is answered by saying that the cause was begun in justice's court; and, if the rule could be applied to cases so begun, the defendant did not, by notice accompanying the plea, waive the benefit of the general issue and admit the facts alleged in plaintiffs' declaration. If there is any other applicable rule, it has escaped my attention.

It is said that the statute of limitations, not having been pleaded, cannot be invoked against defendant's alleged demand, originally evidenced by the \$150 note, "unless there is one rule for the plaintiff and another for the defendant in the one case, and surely that cannot be." This is the substance of the argument upon

this point. It is not pointed out how plaintiffs could properly have pleaded the statute of limitations as against any demand defendant might try to prove under her notice of set-off. The general rule is, of course, that, if relied upon, the statute of limitations must be pleaded. But it has not been applied in such way as to prevent a plaintiff from having the advantage of the statute when a demand sought to be set off by the defendant is barred by the statute.

Other criticisms of the charge upon the subject now being considered are that:

"The view is too strongly stated for the plaintiff in the charge.

"The element of the confidential relations is overlooked.

"The question should have been submitted to the jury as to whether the advances proven to Richard Kincade were on family account or not."

These must be interpreted by the theory of and testimony for defendant. Defendant introduced testimony tending to prove that at various times—some of them within six years before this suit was begun—she let plaintiff Richard Kincade have money and goods on credit. Defendant's counsel contended, and contends, that if the real facts could be elucidated, it would appear that, although the note in suit is made payable to both of the plaintiffs, who are husband and wife, the money for which it was given belonged to plaintiff Richard; that the money and goods furnished by defendant to Richard were really furnished on family account to the knowledge of plaintiff Mary; that there was a sort of mutual account between the parties; and that matters of indebtedness and cross-indebtedness were never balanced and liquidated. But there is no testimony from which a jury could be permitted to reach any such conclusions, whatever the legal effect of such conclusions might be held to be. Stripped of

immaterial things, the defendant's contention is this: She lent the plaintiffs money, for which they gave her a note due in five years. She destroyed the note at their solicitation, or at the solicitation of Richard, and accepted in lieu thereof the parol promise that at some time, if she lived, they would pay the demand. Afterwards, at various times, she furnished to plaintiff Richard money and goods as above related. Ten years after her note was given, she never having demanded pay of her loan from plaintiffs, or either of them, defendant borrowed of them \$200, and gave the note in suit. Neither the alleged promise to pay the demand evidenced by the destroyed note, nor the maturity of that note, whether it was given for one or for five years, was within six years of the time when this suit was begun. Having borrowed money which plaintiffs jointly furnished, and given her note payable to them jointly, it is not perceived how defendant can be allowed to show that as against his creditors the money really belonged to Richard alone. Beyond this, the undisputed testimony is that the money was a part of the proceeds of a sale of land owned by plaintiffs jointly. In any view of the case, defendant's alleged demand against both plaintiffs appears to be barred by the statute of limitations; and, in my opinion, the court should have told the jury that defendant had produced no testimony tending to prove the existence of a demand against the plaintiffs accruing within six years before the suit was begun.

Assuming that the question whether the note originally given by plaintiffs to defendant was given for one or for five years was a question for the jury, the record does not disclose any ruling affecting that question prejudicial to appellant, nor any instruction to the jury which was wrong. The testimony upon that point was produced and admitted.

If, then, there was not a mistrial resulting from the

refusal of the request of defendant to examine the jury, the judgment must be treated as the fair result of the trial. The trial judge said, in denying a new trial, that at about 11:30 a. m. the parties to the suit, the attorney for plaintiffs, and some, if not all, of the witnesses entered the courtroom; the cause having been assigned to him for trial. At the same time the general panel of jurors not on duty came into the courtroom. All was in readiness for the trial, except that defendant's attorney was absent. The judge was advised by the judge's clerk that Mr. Pound had been in attendance earlier in the morning, and had been informed that the trial "might momentarily be reached, and had deputized a representative to receive notice when an opening for the trial was obtained, to whom he, the clerk, had given notice that the trial would forthwith proceed in my division." The court waited at least 20 minutes; then learned who it was who had been delegated by Mr. Pound to apprise him of the assignment of the case for trial. This person was interviewed by the judge, and at once went to Mr. Pound's office, returned, and said Mr. Pound was not in his office, and that he did not know and could not find out his whereabouts. This delay consumed time, and a further delay was had. Finally, after a half hour's delay, a jury was called, plaintiffs permitted to make their *prima facie* case, and the court adjourned. What occurred in the afternoon has been briefly stated. The right to a trial by jury in civil actions is a right which of necessity must be exercised in conformity with and with reference to the rules and the business of the court in which the trial is to take place. Counsel for a defendant not on hand when the cause is called for trial may be admitted, by grace, to enter the trial at any stage before it is concluded. But it is a preposterous notion that, whether the default

is intentional, or unintentional, counsel for defendant may appear after the trial of a cause is regularly begun and make a new beginning of the trial. Any supposed prejudicial consequences of an unintentional default must be presented, after verdict, to the trial court upon a motion for a new trial. There is, in the case at bar, no evidence and no intimation of any prejudice arising from the fact that defendant's counsel did not take part in securing a jury.

The affidavits filed in support of the motion for a new trial show, some of them, that cumulative testimony upon the subject of when defendant's note was due, whether in one year or in five years, may be produced upon a new trial, but there is no showing of diligent, or of any, effort to bring it in upon this trial.

No reversible error is made out, and the judgment is therefore affirmed, with costs to appellee.

STONE, C. J., and KUHN, BIRD, MOORE, STEERE, BROOKE, and PERSON, JJ., concurred.

BROWN v. GEORGE A. FULLER CO.

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW—JUDGMENT ENTERED ON AWARD.

While there are difficulties in the way of applying the provisions of section 13, pt. 3, Act No. 10, Extra Session 1912 (2 Comp. Laws 1915, § 5466), providing for entering judgment in the circuit court upon presentation of a certified copy of the decision of the Industrial Accident Board approving the agreement of settlement, especially in cases where, by the terms of the award, liability of the employer

to make weekly payments runs with disability of the employee, and the disability is not permanent, it is not impossible to apply the law according to its terms; however, a series of judgments upon an award is not contemplated by the act, although a series of executions may be required to enforce payment of the judgment; and the judgment should be entered "in accordance" with the award, by reciting and following the award, which furnishes the data for further action of the court.

2. SAME—JUDGMENT ON AWARD—INTERPRETATION OF AWARD.

"The judgment of the court below, agreeing with claimant's interpretation of an ambiguous award, which may be interpreted as claimant claims, will not be disturbed, where no objection was made as to its form, and no error of law appears requiring reversal of the judgment or requiring the court to set it aside.

Certiorari to Kent; McDonald, J. Submitted June 13, 1916. (Docket No. 84.) Decided September 26, 1916.

James B. Brown presented an award from an arbitration committee against the George A. Fuller Company under Act No. 10, Extra Session 1912, pt. 3, § 13. From a judgment for plaintiff, defendant brings certiorari. Affirmed.

H. Monroe Dunham and *John M. Dunham*, for appellant.

E. A. Maher, for appellee.

From the petition for the writ of certiorari and the return to the writ it is made to appear that an arbitration committee, April 28, 1915, made an award, the substance of which is:

"The said applicant, James B. Brown, is entitled to receive and recover from said respondent, George A. Fuller Company, the sum of \$7 per week during disability (partial) from the 28th day of July, 1913, and that said applicant is entitled to receive and recover

from said respondents on this date \$77 (11 weeks), being the amount of such compensation that has already become due under the provisions of law, the remainder of said award to be paid to said James B. Brown, applicant, by said respondents in weekly payments, commencing one week from the date of the award.

"It is the decision of the arbitration committee that Brown is to return to work for the George A. Fuller Company, and furnished with such employment as he may be able to do. Wages to be \$2 per day (\$14 per week of seven days). No time was lost by applicant from date of accident until December 26, 1914. The Fuller Company agreed to furnish applicant with light work."

No appeal having been taken from the committee to the Industrial Accident Board, a certified copy of the award was produced in the circuit court for the county of Kent December 8, 1915, and, without notice to George A. Fuller Company, judgment was entered for Brown against it for \$84 and costs. A writ of garnishment, later recalled, was issued January 3, 1916, and served on the garnishee defendant January 4, 1916. A writ of *fieri facias* was also taken out. Meantime the George A. Fuller Company, on November 10, 1915, filed with the Industrial Accident Board a petition, praying that the board—

"will by its order decree that the George A. Fuller Company has complied with the order and award of the arbitration committee, and that any portion of said award which may now be in force may be terminated as of the date when the said James B. Brown was laid off, to wit, August 28, 1915, because of the completion of the said hotel building, and that your petitioner may have such other and further relief in the premises as to the Industrial Accident Board may seem meet and just."

This petition Brown answered November 19, 1915, and the matter is pending. The circuit court for Kent county was moved, December 13, 1915, to vacate and

set aside the said judgment, the grounds of the motion being that the terms of the award had been fully complied with; there was no money due Brown when judgment was entered; the judgment "is void and illegal and has no standing in law upon the award upon which it is based." The motion was denied.

The printed record does not contain the petition for the writ of certiorari, but upon examination of the original it is found that it sets out the errors of law relied upon as follows:

"(a) Because the said judgment is void and illegal.

"(b) Because said cause is now pending before the Industrial Accident Board of the State of Michigan.

"(c) Because the judgment has no standing in law upon the award upon which it is based.

"(d) Because the circuit court for the county of Kent had no jurisdiction in said cause.

"(e) Because the award on arbitration has been fully complied with by the said defendant.

"(f) Because under the award there was no money due the said plaintiff at the time said judgment was rendered.

"(g) Because said plaintiff, before taking said judgment on the 8th day of December, A. D. 1915, had submitted himself to the jurisdiction of the Industrial Accident Board of the State of Michigan by filing a sworn answer to the petition of the defendant, on, to wit, the 19th day of November, A. D. 1915, in respect to the same subject-matter upon which the judgment is based."

OSTRANDER, J. (*after stating the facts*). It is said in the brief for plaintiff in certiorari that but one question is involved, which is thus stated:

"Can the circuit court take any jurisdiction of an award of the Industrial Accident Board other than that expressly given it by Act No. 10 of the Public Acts of Michigan, Extra Session of 1912, which is known as the workmen's compensation act?"

This question may be answered in the negative, as counsel answers it, without advancing us very far.

Technically, of course, the court takes no jurisdiction of an award. The award is evidence of a liability; the judgment of the court is required and is provided for, to enforce the liability, since the decisions of the Industrial Accident Board cannot be carried into execution by any action or mandate of the board. The provision for judgment is part 3, § 13, of the law, reading:

“Either party may present a certified copy of the decision of such Industrial Accident Board approving agreements of settlement as provided in part three, section five hereof, or of the decision of such committee of arbitration when no claim for review is made as provided in part three, section eight, or of the decision of such Industrial Accident Board when a claim for review is filed as provided in part three, section eleven, providing for payment of compensation under this act, to the circuit court for the county in which such accident occurred, whereupon said court shall, without notice, render a judgment in accordance therewith against said employer and also against any insurance company carrying such risk under the provisions of this act; which judgment, until and unless set aside shall have the same effect as though duly rendered in an action duly tried and determined by said court, and shall, with like effect, be entered and docketed.”

Manifestly, there are difficulties in the way of applying this provision of the law, especially in cases where, by the terms of the award, liability of the employer to make weekly payments runs with disability of the employee and the disability is not permanent. The procedure, too, if the statute is applied, will be somewhat cumbersome. As an illustration: An award is made to A. of \$5 a week, payable weekly, during disability which is not permanent. A certified copy of the award is produced to a court and, without notice, judgment is entered “in accordance therewith.” Payments being promptly made, no execution is required. In time, payments accrue and are not made and an

execution is applied for. What sum shall the sheriff be advised to collect, and, in default of payment, to make a levy for? Obviously orderly procedure would require that a showing be made, and upon notice, before the execution issued. And, as disability is a fact to be determined by the board, the weekly payment may be reviewed by the board at the request of the employer, the insurance company carrying the risk, the commissioner of insurance, or the employee, and may be increased, or diminished, or ended, if the board finds such action to be warranted. Part 3, § 14. If a judgment has been entered in accordance with the original award and the award is modified or the right to further payments denied by the board, orderly procedure will, in such cases, require that the court be moved to modify the judgment or to vacate it.

In my opinion, these and other difficulties which might be suggested, most of which may perhaps be removed by legislation, do not present insuperable objections to giving effect to the particular provision of the law, although its application may impose burdens upon the parties in interest and upon the courts. It is not impossible to apply the law according to its terms.

It ought to be said, however, that a series of judgments upon an award is not contemplated by the act, although a series of executions may be required to enforce payment of the judgment. And the judgment of the court should be entered "in accordance" with the award, which means that it should recite and follow the award, which furnishes the data for further action of the court. This, although objection to it is not based upon that ground, the judgment in the case before us did not do. The judgment entered "in accordance" with the award will remain in force until satisfied by payment according to its terms, or by such action of the Industrial Accident Board, brought to

the attention of the court, as renders its further enforcement improper.

The award in this case is ambiguous, and it is apparent that the parties do not agree upon its force and effect. Claimant interprets it as an award of \$7 a week, payable during disability, but not to be paid so long as the employer kept him in service at a weekly wage of \$14. The employer, plaintiff in certiorari, interprets it as an award in lieu of payment of which it was to employ claimant at \$14 a week as long as it had work for him to do. There being no more work for claimant, it says the award is vacated—has been performed—by what it has done. The court below seems to have agreed with claimant, and, as the award may be interpreted as claimant says it should be, and as no objection is made to the form of the judgment, no error of law, requiring reversal of the judgment or requiring the court to set it aside, appears, and this court ought not to disturb it. The award, until modified by the Industrial Accident Board, is in force.

The defendant in certiorari will recover costs of this court.

STONE, C. J., and KUHN, BIRD, MOORE, STEERE, BROOKE, and PERSON, JJ., concurred.

PERHAM v. AMERICAN ROOFING CO.

MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW—INDEPENDENT CONTRACTOR.

Where claimant's husband had been employed for more than a year at irregular intervals by a roofing company, at a daily wage, laying roofs, and was accidentally killed while laying a roof for the same firm, which he had taken by the job, to be paid for at so much per square, he was not a servant or employee entitling claimant to compensation under the provisions of the workmen's compensation law (Act No. 10, Extra Session 1912, 2 Comp. Laws 1915, § 5423 *et seq.*), but was an independent contractor. *Gall v. Journal Co.*, 191 Mich. 405 (158 N. W. 36).

Certiorari to the Industrial Accident Board. Submitted June 21, 1916. (Docket No. 12.) Decided September 26, 1916.

Edith May Perham presented her claim against Albert J. Berschbach and Michael J. Herz, copartners as the American Roofing Company, employers, and the General Accident, Fire & Life Assurance Corporation, Limited, insurers, for compensation for the death of her husband in defendants' employ. From a judgment for plaintiff, respondents bring certiorari. Reversed, and award set aside.

Ralph B. Lacey, for appellants.

Albert J. Hetchler, for appellee

The facts are not in dispute. Briefly stated, they are as follows: Prior to July 1, 1914, for a period of more than one year, Albert E. Perham was employed by the American Roofing Company, a partnership, at irregular intervals, as its contracts required, at a daily

wage of \$3, laying roofs. Whether he laid other than slate roofs does not appear. On or about July 1, 1914, the American Roofing Company had to lay the roof on the Webber residence in Detroit, and Perham applied to both members of the firm for the job of laying the slate for \$1.75 per square. To this the firm agreed. Perham at once, or soon, arranged with another workman, Anderson, to do the job with him, they to divide, and a boy was borrowed from the firm, but paid by Perham, as helper. On the 6th of July, while working on the Webber residence, under the said arrangement, upon a scaffold which he had built in a dormer window, Perham fell with the broken scaffold to the ground, the injuries he received resulting in his death. The material employed in roofing was furnished by the American Roofing Company, as well as scaffolds, scaffold hoist, and a slate machine. Anderson, whom Perham had secured to do the job with him, finished the work according to the original arrangement. Perham had already been paid \$20 on account, which sum he divided with Anderson. The widow presented a claim for compensation, and two members of the arbitration committee awarded her the sum of \$8.65 a week for 300 weeks from July 6, 1914. The Industrial Accident Board, on appeal, affirmed the award. Upon this writ two points are raised: One that Perham was not a servant or employee of the American Roofing Company when he received his injury, and was an independent contractor; the other, a minor one, that the award is too large by 58 cents per week.

OSTRANDER, J. (*after stating the facts*). The facts import, not a contract to lay slate at a price per square, instead of by the day, but a contract to do a job of slate laying. It is as though Perham had measured the roof, found the number of squares, and, multiplying by the price per square, had contracted to do the

job for a sum certain. It was a necessary implication that the work was to be done in a workmanlike and proper manner, the premises being considered. Perham was in the exercise of an independent and distinct employment, not under the immediate control, direction, or supervision of the American Roofing Company.

In principle, the point is ruled by *Gall v. Detroit Journal Co.*, 191 Mich. 405 (158 N. W. 36). The opinion in that case contains a reference to the former decisions of this court.

It follows that the second point is unimportant, and that the conclusion of the Industrial Accident Board was wrong, and must be set aside. It is so ordered.

STONE, C. J., and KUHN, BIRD, MOORE, STEERE, BROOKE, and PERSON, JJ., concurred.

In re WYNN'S ESTATE.

PRUIM v. DE WITT.

1. WILLS—CONTEST—PARTIES—INTERESTED PERSONS.

Generally, under the statutes, a contest of a will can be brought only by a person interested at the time the will was admitted to probate, such persons including not only those named as beneficiaries in the will, but those who would share in the estate in case of intestacy, such as the heir or next of kin and those interested under a prior will.

2. SAME—PARTY CONTESTANT—EVIDENCE.

Evidence that contestant was not a relative of decedent, but was taken when two years of age by testatrix and cared for and maintained until 17, when she married and left home, that there was a kindly feeling between them and that deceased had stated the contestant should have all her property, and she had given it all to her, etc., that a previous will had been drafted and either the contestant or her husband had been named as beneficiary, *held*, insufficient to establish any right to maintain a contest, though the contestant would have such right if she could show she was a legatee under a pre-existing will.

3. SAME—COMPETENCY—UNDUE INFLUENCE

Also, *held*, that the evidence which tended to show mental weakness, forgetfulness, and other incidents of old age was insufficient to prove mental incompetency, and that the proofs of undue influence were insufficient to warrant the court in submitting the case to the jury.

Error to Ottawa; Cross, J. Submitted October 18, 1915. (Docket No. 148.) Decided September 27, 1916. Rehearing denied December 22, 1916.

Enno J. Pruim presented for probate the last will of Esther T. Wynn, deceased, which was opposed by Grace De Witt, contestant. The will was allowed in probate court and contestant appealed to the circuit court. A judgment for contestant is reviewed by proponent on writ of error. Reversed.

Lillie & Lillie, for proponent.

Charles E. Misner and Corrie C. Coburn, for contestant.

BIRD, J. A paper purporting to be the last will and testament of Esther T. Wynn, deceased, was admitted to probate in the county of Ottawa. An appeal was taken by Grace De Witt, on the grounds of mental incompetency and undue influence, and these issues were tried out in the circuit court before a jury, resulting

in the will being set aside upon both grounds. The trial court was requested to direct a verdict for the estate, on the ground that the contestant, Grace De Witt, did not have sufficient interest to entitle her to make the contest. The request was refused, and error is assigned thereon. This point, if well taken, is a serious one, and should be first examined. The testatrix was childless, and appears to have had no near relatives. Grace De Witt does not pretend to be either a relative or heir, but, as we assume, bases her right to contest upon the ground that she was a legatee in a former will claimed to have been executed by the testatrix a few years prior to the one in question.

The rule which enables one to contest a will is generally stated as follows:

"Under the statutes generally an action to contest a will can be brought only by a 'person interested' at the time the will was admitted to probate. Such 'persons interested' include not only those named as beneficiaries in the will, but also those who would share in the estate in case of intestacy such as the heir, or next of kin, and those interested under a prior will." 40 Cyc. p. 1241.

See, also, 16 Enc. Plead. & Prac. p. 1009; 1 Beecher's Probate Law & Practice, § 509; *Williams v. Bailey*, 186 Mich. 677 (153 N. W. 39).

The substance of the evidence which appears in the record bearing upon the question of the interest of contestant is that she is no relative of the deceased; that she was taken when 2 years of age by the testatrix, cared for and maintained until she was 17 years of age, at which time she was married and left the home of the testatrix. Many expressions of kindly feeling toward the contestant were testified to as having been made by the testatrix. To some she stated that the contestant "should have all of her property";

to others she said that she had given it all to Grace; and the scrivener who drew the will in question testified that he drew a previous will for her some years before, in which either Grace De Witt or her husband was named as beneficiary, he could not recall which. There was also proof that several years before she had made a will giving all of her property to the church of which she was a member, and an old lady companion testified that at one time she offered to will her property to her. We think the rule is well established by the authorities that Grace De Witt would have a right to contest the present will if she were, in fact, a legatee under a prior will, but before this right would accrue to her a satisfactory showing should be made to that effect.

We do not think such a showing sufficiently appears by the record in this case. The former will was not produced; neither was it accounted for. If it were lost, no evidence was given of its contents, other than that referred to. In the case of *Kosteletzky v. Scherhart*, 99 Iowa, 120 (68 N. W. 591), a very similar question was presented. In that case the proof was made of the due execution of the prior will, and that the formalities of the law were complied with in its execution. It was held in that case that the showing was sufficient to show the interest of the contestant.

In the case under consideration, the proofs leave it uncertain as to whether she was a legatee at all. There was no showing that the formalities of the law were complied with in the execution of the prior will, as in the case cited, and, as before said, no effort was made to produce the will or to account for it, except the statement of the scrivener who had at one time the possession of it that he delivered it to the testatrix, but was not certain when he did so, and that it was not found among her papers. We think that under the state of the proofs at the time the request was

made it should have been granted. Inasmuch as the question will naturally arise upon a retrial as to the practice, we suggest that the better practice is to determine the contestant's "interest" in advance of the trial. 16 Enc. Plead. & Prac. p. 1016. Under the present practice this can be accomplished by a motion to dismiss the appeal.

The record discloses that the testatrix was an old lady 78 years of age when she executed the will in May, 1914. At that time she was living alone, as she had been for several years. She did her own housework and looked after her own business affairs. She was a devoted member of the Methodist Church, and was a member of the church board. She attended church regularly on Sunday, and prayer meeting on Wednesday evening, and gave generously of her means to the church. She made frequent visits to Chicago to see her foster daughter, going and returning alone. In May, 1914, she returned from one of her visits, and the following day went unaided and alone to an old resident who drafted papers and dictated a simple will providing for the payment of her debts, a small legacy to the husband of her foster daughter, and gave the residue to a Mrs. White, one of her neighbors. She gave as a reason for changing her will that upon her recent visit to her foster daughter in Chicago she had not been treated well. She gave as a reason for giving the property to Mrs. White that she had been kind, and aided her in sickness. Several women acquaintances gave it as their opinion that she was not mentally competent to execute the will in question. Their reasons for so thinking were that she had failed in health after her sickness in 1912; that she had complained at times of her head; that she was at times forgetful, and at other times would repeat her words, and forget what she was conversing about. Nothing was detailed by them other than what comes to nearly

every man and woman of her age, as a result of a gradual weakening of physical and mental powers. These reasons furnish no basis in support of an opinion that she was mentally incompetent to execute the will in question. The court should have withheld this question from the jury.

Neither do we think he should have submitted to the jury the question of undue influence. The charge of undue influence was directed at Mrs. White, the beneficiary. There is no testimony showing that Mrs. White exercised any undue influence over her, or even attempted to influence her with reference to her property, or that she ever had any talk with her with reference to its disposition. The only thing shown was that she had an opportunity, but even the opportunity must have been somewhat brief, because the testatrix was home from Chicago only a few hours before she charged her will. Some attempt was made to show that Mrs. White refused to send for contestant during the last illness of the testatrix. One of the contestant's witnesses testified that she asked the testatrix if she wanted Grace to come, and she nodded that she did not. The record shows without contradiction that Mrs. White was following the direction of testatrix in not sending for contestant.

For the reasons indicated, the judgment is reversed, and a new trial granted. Proponent will recover her costs.

STONE, C. J., and KUHN, OSTRANDER, MOORE, STEERE, BROOKE, and PERSON, JJ., concurred.

BABCOCK v. HEENAN.

1. EQUITY—INJUNCTION—PARTIES—COMPLAINANT—FORMER OWNER.

A minor who purchased a parcel of land in the name of his mother and later sold the premises to third parties was not a proper party complainant in a suit to enjoin the closing of a street which the owners had represented to him was dedicated or open to the public. But since an amendment would have been proper on motion or objection, the court on appeal will treat the same as having been done, no harm resulting to defendant from treating the amendment as made.

2. SAME—STREETS—DEDICATION.

After making representations concerning the opening or dedication of a street, the owners could not later change their intention to dedicate, to the injury of one who purchased adjoining property in reliance on the existence of the street, or as to his grantee or vendee.

3. SAME—HIGHWAYS AND STREETS—OBSTRUCTION.

The erroneous description of the town or range in which a parcel was situated could be and was rightly amended on the hearing, when the error was merely technical and not prejudicial to appellants.

Appeal from Sanilac; Beach, J. Submitted January 13, 1916. (Docket No. 10.) Decided September 27, 1916.

Bill by Roscoe W. Babcock and another against James Heenan, James McCaren, and another, to enjoin the obstruction of a street or highway. From a decree for complainants defendants appeal. Affirmed.

H. V. Babcock, for complainants.

C. F. Gates for defendants.

BIRD, J. Complainants seek by this proceeding to restrain defendants from interfering with their use

of a strip of land 4 rods in width by 40 rods long, situate in the city of Sandusky, which they claim is a public street. The chancellor granted the relief prayed for, and defendants have appealed.

The case made by complainants in their bill is, in substance, that on January 1, 1904, complainant Babcock purchased from defendant McCaren a 14-acre tract in the village of Sandusky. That previous to the purchase thereof, and while defendant McCaren and his agents were endeavoring to make the sale to him, they exhibited to him a surveyed plat, which showed the 14-acre tract. The plat also showed another tract of similar size lying west of it, which had been subdivided. Through this latter tract the plat showed a 4-rod strip running from Elk street on the west to the 14-acre tract, which complainant afterwards purchased; that defendants pointed out this strip on the plat, and stated that the same was reserved for a public highway, and complainant Babcock shows that he would not have purchased the said 14-acre tract had he not been assured of the use of this street, as there was no other way of reaching the 14-acre tract without passing over the premises of other persons. He further shows that some time after he purchased the tract, defendant McCaren conveyed the said tract to Heenan, who owned land immediately adjoining on the south, and that said Heenan in 1913 closed said street and denied complainant Corbishley, the grantee of said Babcock, the right to use the same.

1. Defendants raise the question that neither complainant has any standing in court, because not proper parties. This contention arises out of the fact that when complainant Babcock purchased the tract, he had not reached his majority, and he elected to have the title placed in his mother, so that it would be more easily conveyed if he desired to sell it. The testimony shows without contradiction that he carried on the

negotiations which resulted in its purchase, and afterwards its sale, and that his money was invested in it. Whether he would have had sufficient interest to maintain the suit had it been commenced while the title was still held by the mother, it is unnecessary to decide. Three months before suit he disposed of the premises by causing them to be transferred by his mother to Corbishley. This left him without any legal or equitable interest in the premises. The objection as to him as a party appears to be well taken. At the time the suit was commenced, Corbishley had both the legal and equitable title, and therefore was a proper party. Upon motion the proceedings might have been amended by striking out the name of Roscoe Babcock, as complainant. In view of this we will now consider that as having been done, it not appearing that any harm resulted to defendants' case by reason of his having been made a party.

2. The testimony convinces us that complainant Babcock purchased the 14-acre tract in reliance upon the representations of the defendants that the strip was a public street. Upon the question whether this strip was a public street the testimony was somewhat conflicting. The chancellor, after hearing the testimony, was impressed that it was. The surveyed plat was not of record, and it does not appear that there was ever a formal dedication of the land for a public street, although the public used it to some extent as a street, both before and after complainant purchased, and the city authorities treated it as such. The city placed a crosswalk at the end of the street at Elk street, and refrained from assessing it from 1904 to 1914. The testimony of the surveyor who surveyed the tract is rather convincing that it was the intention of the defendants at the time the survey was made to make a public street of it. And the testimony of some of the defendants shows that it was their intention

to make a street of it prior to the time they sold the 14-acre tract to Babcock.

But it is argued that if defendants had intended to make a public street of it after they sold the 14-acre tract to complainant, they had a right to change their intentions concerning it. If defendants sold the 14-acre tract to complainant on the strength of the existence of a street connecting it with Elk street, they would have no right to change their intentions, at least so far as it affected its use by complainant Babcock and his grantee. It is certain that the city understood that there had been a dedication or it would not have refrained from assessing it. Neither would it have constructed the crosswalk at the end of it. If the defendants had changed their intentions about making it a public street, they ought to have advised the city of the fact when they saw it constructing the crosswalk. In *Ruddiman v. Taylor*, 95 Mich. 547 (55 N. W. 376), which involved a similar proposition, it was said that:

"It is well settled in this State that persons who have dedicated or platted lands and sold lots on streets cannot thereafter withdraw or change the use of such public streets to the detriment of their grantees, especially where the public have evinced an acceptance of the dedication by performing highway labor on such streets. *Sinclair v. Comstock*, Har. Ch. 404; *Smith v. Lock*, 18 Mich. 56; *White v. Smith*, 37 Mich. 291; *Grand Rapids, etc., R. Co. v. Heisel*, 47 Mich. 393 [11 N. W. 212]."

Upon a review of the whole record, we are inclined to agree with the conclusion reached by the chancellor that the strip of land in controversy is a public street.

3. The complainants in describing the strip in dispute misstated the "range." The court permitted them to correct this by amendment on the hearing, and exception is taken thereto. The error was a technical

one, and misled no one. The amendment was very properly allowed.

The decree of the trial court will be affirmed, but without costs to either party.

STONE, C. J., and KUHN, OSTRANDER, MOORE, STEERE, BROOKE, and PERSON, JJ., concurred.

FOLEY v. DETROIT & MACKINAC RAILWAY CO.

1. CARRIERS—RAILROADS—EVIDENCE—PERSONAL INJURIES—NEGLIGENCE—BOARDING TRAIN.

Where plaintiff brought an action against defendant railway company for injuries sustained by him in attempting to board the train, after alighting at what he supposed was his destination, the evidence which was held in a previous opinion in the same cause to have presented a question of fact upon the issue of negligence, was, on the second trial, properly left to the jury: the first decision was rightly treated as the law of the case, at the retrial.

2. EVIDENCE—MATERIALITY—TRIAL—CROSS-EXAMINATION.

The question asked of plaintiff, on cross-examination, whether any one depended on him for support, was not material and was properly excluded, since his damages were not in any way affected by his family requirements, or necessities.

3. SAME—NEGLIGENCE—PROPER CROSS-EXAMINATION.

After testifying that, from examination of plaintiff after the accident, he was of the opinion that he had been drinking, the physician, who was a witness for defendant, was rightly prevented from answering the interrogatory whether he had stated that the plaintiff had told him that he had been drinking, on objection to the form of the question, when counsel was not prevented from showing the extent to which plaintiff's condition might have been due to the use of intoxicants.

4. DAMAGES — CHARGE — RAILROADS — NEGLIGENCE — CARRIER AND PASSENGER.

The trial court did not err in charging the jury, in a suit brought by a passenger who was injured in attempting to board defendant's train, that it was the duty of the jury to allow plaintiff such sum as would compensate plaintiff for his injuries, limited or defined by a detailed statement of the different elements to be considered, and was not too broad or comprehensive.

5. RAILROADS—PERSONAL INJURIES—INSTRUCTIONS.

In a personal injury case against a carrier for negligence in failing to allow sufficient time for boarding a train, the court was not in error in charging that the jury might consider the interest of the witnesses of the parties, their bias, prejudices, etc., as it is always proper to consider the interest or bias that any witness might have.

Error to Arenac; Sharpe, J. Submitted January 6, 1916. (Docket No. 55.) Decided September 27, 1916.

Case by David E. Foley against the Detroit & Mackinac Railway Company for personal injuries. Judgment for plaintiff. Defendant brings error. Affirmed.

Henry, Henry & Henry (James McNamara, of counsel), for appellant.

Defoe, Hall & Converse, for appellee.

BIRD, J. Plaintiff is a resident of Toledo, Ohio. On the 8th day of July, 1912, he left Toledo to go to Turner, a village situate on defendant's line. Either through his own or the defendant's error, he alighted at Twining, a station three miles south of Turner. When he discovered the error, he attempted to board the train again, and in so doing the train started while he was on the first step. He was carrying a suit case, and it became fast or fouled in the hand rails in such a way that he could get no further. In trying to extricate it he lost his balance, and fell from the train and

was injured. Defendant was charged with negligence in failing to give him a reasonable time to reach a place of safety before starting the train. A judgment was awarded him by the jury, and defendant has assigned error.

For a more detailed statement of the case, see former opinion of this court, 179 Mich. 586 (146 N. W. 186).

1. Upon the former review of this case, it was contended that the plaintiff had failed to establish the negligence of the defendant, and that the trial court was in error in refusing to direct a verdict for the defendant. The question was discussed at some length in the opinion of Mr. Justice STEERE, and it was held, in effect, that the testimony made the question of defendant's negligence one of fact for the jury. It is asserted by plaintiff's counsel, and does not appear to be denied by opposing counsel, that the testimony on the material questions of the case was substantially the same on the second trial as on the first. If this be so, there is no occasion to reconsider the question of the defendant's negligence as shown by this record. It is sufficient to say that we are still of the opinion that the trial court was in no error in considering the question as one of fact for the jury.

2. The plaintiff upon cross-examination was asked the following question:

"Q. Mr. Foley, at the present time is there any one dependent upon you for support?"

The question was excluded because not material. Counsel say in support of its materiality that:

"Whether a man worked or refrained from working, whether he earned a certain amount, or a less amount, might depend upon whether or not he was supporting a wife or children."

The ruling was correct. If it were otherwise, the amount of damages recoverable in such cases would

depend, in some measure, upon the injured man's necessities.

Dr. Tupper, a witness for the defendant, testified on redirect examination that from his examination of the plaintiff after the accident he was of the opinion that he had been drinking prior to the day of the accident. The doctor was then asked:

"Q. And you also said that Mr. Foley told you he had been; is that true?"

Exception was taken to the form of the question, and it was excluded, and we think properly so. Counsel was not prevented from showing the extent to which the plaintiff's condition might have been due to his indulgence in intoxicating liquors.

3. While instructing the jury on the question of damages, the trial court made use of the following language:

"If you will just bear that in mind. I cannot better express it than to say it is your duty, if you find for the plaintiff, to allow such sum as will make him good; compensate him for the injury he has sustained."

The specific objection to this part of the charge is that it was "too broad and comprehensive." Following the language above quoted, the court proceeded to explain to the jury in detail what he meant by allowing the plaintiff such sum as would make him good. The following quotation will illustrate the way he explained it:

"Now, what he has been compelled to pay out for doctors, nursing, medicines, and hospital bills, you see, that is something that you must allow him to make good. Then whatever he has lost in services you must make good to him," etc.

The court then enumerated the different elements which the jury were entitled to consider in reaching their conclusion on the question of damages. The

charge on that phase of the case was a very clear statement of the law, and was without error.

4. The jury were further instructed that:

"A number of witnesses have been called, and you must consider all of the testimony submitted to you. Consider the interest of the witnesses, their bias or prejudices, and apply all of those little tests and earmarks which occur to you to determine what the truth of the matter is."

In making their objection to this part of the charge, counsel say:

"This is an action by a laboring man against a railroad corporation. On the trial of this case the crew on the train in question were called as witnesses. Some testimony was given bearing upon the relation of the witnesses to the defendant railway company. We feel that the court was not justified in the use of the language above quoted, and it is our position that nothing occurred throughout the trial of this cause to justify the court in his charge to the jury, in telling them to consider the interest of the witnesses, their bias or prejudices, and apply all of these little tests and earmarks."

The charge was proper. The instruction applied to all of the witnesses sworn in the case. The interest or bias a witness may have is always a subject of inquiry (*Geary v. People*, 22 Mich. 220; *Swift Electric Light Co. v. Grant*, 90 Mich. 475 [51 N. W. 539]), and must be considered if the truth is to be arrived at. No reason is apparent why the application of the rule should not be made in testing the truthfulness of the testimony of railway employees as well as of other witnesses.

We are of the opinion that the assignments are not well taken. The judgment will be affirmed, with costs to the plaintiff.

STONE, C. J., and KUHN, OSTRANDER, MOORE, STEERE, BROOKE, and PERSON, JJ., concurred.

DERING v. DETROIT UNITED RAILWAY.

ADJOURNMENT—WITNESS—ABSENCE—GROUNDS.

Defendant's case was originally set down for trial at a date named, and was thereafter called a day earlier upon less than 24 hours' notification. After the selection of a jury, which took half a day, defendant's attorney applied for an adjournment until the following morning to enable one of the chief witnesses for the defendant to be secured, who lived in another State, and who could not be present in time to testify unless the court should grant the adjournment. There was testimony tending to show a vigorous effort to get the witness. *Held*, that the right was improperly refused and the court should have granted the application.

Error to Wayne; Mandell, J. Submitted January 4, 1916. (Docket No. 15.) Decided September 27, 1916.

Case by August Dering against the Detroit United Railway for personal injuries. Judgment for plaintiff. Defendant brings error. Reversed.

Corliss, Leete & Moody and *William G. Fitzpatrick*, for appellant.

Walter E. Martin and *William Ellsworth*, for appellee.

BIRD, J. Plaintiff brought suit to recover compensation for injuries which he received at the intersection of Rowena and Hastings streets in the city of Detroit, while attempting to board one of defendant's cars. His claim is that, when the car stopped at the usual stopping place, he took hold of the handle on the front end of the car, but before he could board the car it started and threw him down, and dragged him for

a considerable distance. The trial resulted in a verdict for plaintiff of \$400. Defendant assigns error on the refusal of the trial court to grant a brief adjournment of the case to enable it to produce as a witness the conductor of the car.

It appears that the case was set down for trial November 18, 1914. Late in the afternoon of November 16th, defendant's counsel were notified that the case then on trial had been suspended to enable one of the counsel engaged therein to be in attendance upon this court in the city of Lansing, and that this case would be called on the morning of November 17th, a day sooner than was anticipated; that the examination of witnesses began on the morning of November 17th, and was finished soon after the midday recess, whereupon defendant's counsel, Mr. Fitzpatrick, applied for an adjournment until morning, so that the conductor, Mr. Schaefer, could be used as a witness in defendant's behalf, and in support thereof he showed that, sometime after the accident, the conductor of the car left defendant's employment, and on the 16th it was learned that he had moved to East Palestine, in the State of Ohio, 225 miles distant from Detroit; that upon the forenoon of the 17th the defendant had gotten into communication with him by telephone and telegraph, and that he had answered he would leave his home that evening and arrive in Detroit the next morning in season for court. Upon this showing the trial court refused to grant the adjournment. It was further shown by defendant upon the motion for rehearing that, at the time the case was taken up on the morning of the 17th, the trial court made inquiry as to how long it would take to try the case, and defendant's counsel replied that it would probably take a day and a half, and that plaintiff's counsel were of the same opinion. Plaintiff's counsel, however, do not recall this conversation. They filed affidavits in oppo-

sition to the application for a rehearing, in the trial court, but have filed no brief in opposition to a new trial in this court. The motion for a rehearing was denied. In denying the motion for a new trial, the court said:

"First. The testimony now offered, being that of the witness Schaefer, is merely cumulative.

"Second. Nothing was stated to the court at the opening of the trial of the inability to proceed to trial, and the court did not know and had no means of knowing that Schaefer's presence at the trial might not be secured, and in fact did not know that Schaefer was to be produced as a witness for the defendant. The case was brought on for trial in the regular way, although perhaps a day earlier than was expected, and I am of the opinion that if due diligence had been exercised the defendant would have been aware that the witness Schaefer had changed his residence, and at the time of the trial did not reside within the city of Detroit. It does not appear that any effort was made on the part of the defendant to obtain Schaefer's attendance at the trial until after the trial had been begun."

It appears to be conceded that the case was called a day earlier than it had been set down for, and that defendant's counsel was not notified of the fact until late in the afternoon of November 16th. It further appears that on the 16th an effort was made by the defendant to locate the witness Schaefer, and that it did not get in touch with him until the forenoon of November 17th, after the trial was in progress. The forenoon of November 17th was exhausted in the examination of witnesses, as well as a portion of the afternoon session. Counsel for defendant claims, and it does not appear to be disputed, that, had said adjournment been granted, it would not have involved a loss of to exceed an hour and a half of the court's time. It is obvious from the testimony introduced that the conductor was an important witness, and that he was beyond the jurisdiction of the court, and could

not be forced to attend, but had promised to be present on the morning of the 18th, the day the case had theretofore been set down for trial, and within the time which counsel announced at the beginning it would take to try the case. We are of the opinion that the trial court should have granted this brief adjournment. We are not unmindful of the pressure of work in the Wayne circuit courts, and we recognize the fact that, in order to keep apace with the work, the time of the courts must be improved; but not infrequently the refusal of a request of this character is more apt to add to the work than to diminish it. We are of the opinion that the trial court did not give as much consideration as he should have done to the fact that the witness Schaefer could not be forced into court at the pleasure of counsel, and that, in dealing with witnesses outside of the jurisdiction of the court, their wishes in a measure must be respected. While the judgment is not large, we are of the opinion that, under the conditions as they existed, the adjournment should have been granted.

The case will be reversed, with costs to defendant.

STONE, C. J., and KUHN, OSTRANDER, MOORE, STEERE, BROOKE, and PERSON, JJ., concurred.

BUCK v. LOCKWOOD.

1. EQUITY—BILL OF COMPLAINT—MULTIFARIOUSNESS—PLEADING—ESTATES OF DECEDENTS.

It was not a ground of objection to a bill of complaint, filed against a decedent's estate, for an accounting and the allowance of a note against the estate and to set aside a deed of trust property by a trustee defendant, that it was multifarious, where all the defendants were interested, though separately, or in different degrees, as to the subject-matter of the controversy.

2. ESTATES OF DECEDENTS—JUDGMENT—EXECUTORS AND ADMINISTRATORS—RES JUDICATA—ASSIGNMENTS FOR BENEFIT OF CREDITORS.

An administrator who is made a party to a suit as a representative of the estate binds the heirs and others having interests so as to conclude their rights.

3. EQUITY—TRUSTEES—PURCHASER IN GOOD FAITH—BONA FIDES—JURISDICTION.

One who purchased from a trustee for creditors under a written instrument of trust with full notice of the facts and source of the title, could not question the jurisdiction of the court of equity, under a bill of complaint filed to set aside the transfer and enforce complainant's rights under the trust instrument.

4. SAME—PROBATE COURT—TRUSTS.

The probate court having jurisdiction of an estate of a decedent has no power to determine the question of who should pay any deficiency that might remain after applying the proceeds of a trust assignment to the satisfaction of debts owing by the deceased or to adjudicate the rights of the trustee, beneficiary and *cestui que trust*, and purchaser at trustee sale; it was a proper subject for the court of equity in the county in which real property included in the trust was located; and the court properly determined the question of deficiency and whether the promissory note of decedent, which the real estate was transferred to secure, was given for the alleged purposes.

5. **SAME—EXCLUSIVE JURISDICTION—EXECUTORS AND ADMINISTRATORS.**

The jurisdiction of probate courts was meant to be exclusive, except as the court of chancery, in special cases, might render them aid or assistance, by means of auxiliary remedies as might be needful to prevent wrong and injustice, in cases where the probate jurisdiction may be rendered effectual.

6. **SAME—TRUSTS—CONVEYANCE TO TRUSTEE—BREACH OF DUTY.**

Where the trustee for the benefit of creditors of an assignor was charged with wrongfully conveying the trust property to a third person, who it was understood should reconvey to the trustee, the court of equity had jurisdiction, if the trust could not be enforced without its aid, and the complexity of the various claims of the interested persons required equitable cognizance.

7. **SAME—RES JUDICATA.**

The judgment of the probate court, not on the merits of such suit, but in effect determining that the note of decedent, presented against the estate, was not a claim against his estate, and there was no liability thereof to the trustee, was not conclusive of the issues raised by a bill of complaint to enforce the trust and determine the liability for a deficiency of the estate.

8. **SAME—FRAUD—NECESSITY OF CHARGING.**

Because there was no charge of fraud in the pleadings, and the parties appeared, or were found, to have acted in good faith, did not preclude relief, and the right to relief did not depend on the bad faith of the trustee, whose conveyance contrary to the terms of his trust could be set aside, though executed in good faith.

9. **SAME—COURTS—REAL PROPERTY—JURISDICTION.**

But the circuit court of Ionia county could not assume jurisdiction to pass on deeds given by decedent in Ingham county, which did not relate to the primary issues in the chancery case in the former county, though it had authority to pass on the deficiency and accounting, and to pass on the values of real and personal property of the decedent. The subject-matter being purely local, the court of the county in which the real property was situated alone had jurisdiction.

Appeal from Ionia; Davis, J. Submitted April 20, 1916. (Docket No. 77.) Decided September 27, 1916. Rehearing denied December 22, 1916.

Bill by Edwin A. Buck, trustee, against Fred S. Lockwood, Lorenzo Webber, and others, for an accounting and to set aside certain deeds. From an order overruling separate demurrers to the bill, defendants appeal. Modified and affirmed.

George E. Nichols and *A. R. Locke*, for complainant.

W. T. Webb, *C. H. McLean*, *Ellis*, *Mathews & Ellis*, and *Ellis & Ellis*, for defendants.

STEERE, J. This is an appeal from an order overruling a general demurrer or demurrers to plaintiff's bill in chancery in the above-entitled suit filed in the circuit court of Ionia county. The learned circuit judge who heard and passed upon this demurrer in the first instance has painstakingly stated the material parts of the pleadings and reviewed the questions involved in a carefully considered and helpful opinion which, after examination of the record and authorities cited in briefs of counsel, we find sufficiently and clearly states the case and issues raised and reasons to right conclusions, except as to subdivision V, touching jurisdiction of the Ionia county court to directly decree against title to lands in Ingham county, which will be considered later. The opinion is as follows sectional references being to How. Stat. [2d Ed.] :

"I. Substantially the different demurrers raise the following questions:

"(1) That the bill is multifarious for the reason that divers distinct matters and causes in which the defendants are not jointly in any manner interested or concerned are attempted to be tried in one cause of action and under one bill of complaint.

"(2) Because the circuit court for the county of Ionia, in chancery, has no jurisdiction, inasmuch as

the matters involved must be tried and determined in a suit at law in the probate court for the county of Ingham.

"(3) Because there is no privity between the complainant and any of the defendants which would enable him to call upon the defendants for the payment of any debt due from the estate of Charles E. Lockwood, deceased, to him or any of the parties for whom he is acting.

"(4) Because it appears from the bill that Webber was acting for the complainant and others, and that, inasmuch as no fraud of any kind is charged against any of the defendants, which would include Webber, a court of equity has no jurisdiction, under the circumstances stated in the bill, to set aside or hold for naught any conveyance or sale of the property made by Webber to the Portland Farmers' Elevator Company.

"(5) Because the probate court for Ingham county, having assumed jurisdiction over the estate of Charles E. Lockwood, deceased, and such matters having been tried before the commissioners on claims and appealed, and the judgment of the circuit court rendered disallowing the claim against said estate asserted by Lorenzo Webber, trustee, and such judgment now being in full force and effect, that it is binding upon the complainant and the beneficiaries under the trust, and that the matters cannot be retried in this proceeding.

"II. The statement of facts made in the bill of complaint must be taken as true, and, adopting this rule, upon an examination of the bill, I find that it appears therefrom that on the 29th day of July, 1911, Fred S. Lockwood was indebted to the Webber State Savings Bank, of which Lorenzo is cashier, in the sum of \$8,000, to the heirs of John A. Webber, of whom Lorenzo Webber is one, in the sum of \$14,500, and to complainant in the sum of \$2,000, and, being so indebted, an agreement was entered into by which said Lockwood executed and delivered to Lorenzo Webber, for the use and benefit of the parties mentioned, a trust conveyance to secure the payment of such indebtedness. By this conveyance Webber was given power and authority to take possession of the prop-

erty described in the trust instrument and consisting of real estate and personal property and to continue the elevator business that Lockwood was engaged in or close it out at private or public sale, as he (Webber) might determine.

"That on the 3d day of August following the execution and delivery of the instrument mentioned Lockwood approached the complainant and said to him that he believed he could pay off the indebtedness secured if he could have more time, and it was then talked that if Lockwood would get his father, Charles E. Lockwood, to sign a note for \$6,000, to be delivered to Webber as trustee as additional security, for a consideration, it would be granted, giving Fred S. Lockwood an opportunity to pay off the indebtedness, and that said note was given and made payable to the Webber State Savings Bank or bearer, delivered to complainant by Fred S. Lockwood, who in turn delivered the note to Webber as trustee, and informed him of the arrangement that he had made with Lockwood, and Webber accepted the note as additional security, placed it in an envelope, and so marked it, and in pursuance of this arrangement Lockwood went on with the business, drawing money from the bank and depositing therein to the account of Fred S. Lockwood, elevator, Lorenzo Webber, trustee.

"The matter stood in this way until September 23, 1912, when Lockwood brought to Mr. Webber a note for \$6,000 due on April 23, 1913, signed by Charles E. Lockwood, which was accepted by Webber as a renewal of the original note and as additional security for the liabilities of Lockwood, represented under said trust agreement; that after this last note was given the business was carried on until January, 1913, when, for certain reasons, Mr. Webber took possession of the properties and conducted it under his personal management until the 14th day of June, 1913, at which time he closed down the plant and proceeded to advertise the property for sale at public auction on the 8th of July, 1913. Webber published notices in the different newspapers and posted the same and did all in his power to give publicity to the sale in the hope of realizing as much as possible for said property, and a fair, open sale was held on July 8, 1913. The property was

sold for \$9,300. There was some cash on hand, which added to the amount received from the sale of the property, and, after deducting the current debts of the elevator business, left a deficit of more than \$10,000 upon the original indebtedness secured by the trust instrument; that Webber then claimed the liability became fixed upon the \$6,000 note which he held as trustee, and which was given as additional security by Fred S. Lockwood and signed by his father.

"Charles E. Lockwood died on the 5th day of March, 1913, leaving a small personal estate. His heirs at law were Fred S. Lockwood, J. B. Lockwood, Oda G. Watson, Effa G. Lockwood, and Neita Dey. On the 2d day of May, H. J. Watson was appointed administrator of his estate by the probate court for the county of Ingham. Commissioners on claims were appointed, and Webber filed his claim setting forth in an affidavit the facts, in part as hereinbefore stated, and the matter came on for hearing before the commissioners and was disallowed. An appeal was taken to the circuit court for the county of Ingham, and the case came on to be tried before the circuit court for that county on the 1st of February, 1915. From the testimony in the case it appeared that Webber had sold and conveyed the personal and real estate set forth in the trust instrument to one Jed H. Briggs; that said Briggs purchased said property at the instigation of Webber, to the end that a fair valuation might be obtained for the same; that there were no purchasers or bidders at the sale who would bid an amount which reasonably represented the true valuation of the property, and, inasmuch as there were no bids in excess of the amount bid by said Briggs, the property was struck off to him for \$9,300 by Webber as trustee, who thereafter made conveyance to Briggs in pursuance of the sale, and on the 12th day of July, 1913, Briggs and his wife conveyed to Webber, as trustee for the beneficiaries under the trust instrument given by Lockwood.

"At the close of trial of the case a motion was made on behalf of the estate that, inasmuch as the sale was invalid and void for the reason that Webber, as trustee, could not, under the law, convey the premises and property to Briggs for the purpose of having

Briggs reconvey the property to him as trustee, the claimant was not entitled to recover upon the note because there was no valid sale, and therefore it could not, in the circuit court, on the law side thereof, be determined whether or not there was a deficiency so as to fix the liability upon said note so delivered to the said Webber as trustee as additional security to the general indebtedness of said Fred S. Lockwood; that after the argument of this motion the court decided and determined that the complainant was not entitled to recover, for the reason that the sale was invalid and void and conveyed no title, and that there was no way to determine in this case whether or not there was a deficiency upon the note, and thereupon directed a verdict against Webber as trustee.

"On the 24th of October, 1913, Webber and his wife conveyed the real estate and some of the personal property to the Portland Farmers' Elevator Company, who thereupon took possession thereof, and who is now in the possession and control of the property; that the company, through its officers and representatives, understood and knew of the sale and of all of its conditions and how made and the purpose thereof, and took said property with full notice of any defect in title or any invalidity of the sale; that under the ruling and judgment of the circuit court for Ingham county there has been no valid and legal sale of the premises, and the whole matter stands as if no sale had been made, and that under such conditions there was no way of determining the question as to whether there is a deficiency between the actual value of the property coming into the hands of Lorenzo Webber, trustee, and the amount of the original indebtedness, to secure the payment of which said trust agreements were executed and delivered, except by a court of equity upon an accounting, or by setting aside the deed so given to the Portland Farmers' Elevator Company and reselling said property and accounting for the sale of the personal property at its true and actual value, as near as may be; that upon such an accounting either by way of charging Lorenzo Webber, trustee, with the full value of all the property in his hands upon the 8th of July, 1913, the date of the sale, or by a resale of the property, there would be a de-

ficiency or shortage in either case of at least \$10,000, and the full and complete liability upon said note so given as additional security would thereupon become fixed and determined, and the complainant and his cobeneficiaries would be entitled to the benefits and advantages which would arise from the fact of having said note as additional security for said indebtedness.

"Charles E. Lockwood before his death was possessed of real estate in Ingham county worth \$10,000 and upwards. On the 1st of February, 1913, he conveyed this property to the defendants Oda G. Watson, Effa G. Lockwood, and Neita Dey, his daughters, for a consideration of love and affection only, and afterwards Oda G. Watson and Effa G. Lockwood conveyed their interests to Ora W. Dey and Neita Dey. On the same day Charles E. Lockwood conveyed other lands to J. B. Lockwood, his son, for a consideration of love and affection only, and they afterwards conveyed that property, so that by mesne conveyances the title passed to James R. Fisher and Mary E. Fisher, two of the defendants.

"The estate of Charles E. Lockwood has not been closed nor the administrator discharged, and the personal property is wholly insufficient to pay the claims allowed and the expenses of administration. The real estate so conveyed must be made subject to the payment of these claims and of this claim, if it is paid at all, and upon these facts the complainant asks the following relief:

"(1) That Lorenzo Webber, trustee, come to an accounting of all the property received under the trust deed and conveyance from Fred S. Lockwood, and that he be charged with the true, just, and reasonable value thereof.

"(2) That the conveyance made by the said Lorenzo Webber as trustee to the Portland Farmers' Elevator Company be set aside and held for naught; or, in case the court shall so determine that the true value of said premises so conveyed at the date of said conveyance to the said company be fixed and determined by the court, and that Webber be charged with the sum, together with all moneys and property that he has received by virtue of his office as trustee.

"(3) That the amount of indebtedness to said Webber as trustee be also fixed and determined, and the amount of property he should be charged with on such accounting be applied thereon and the deficiency, or shortage, if any, be fixed and determined by the court to the end that the liability of the said Fred S. Lockwood to the complainant and the other beneficiaries under the trust be fixed and determined, after the application of all the properties, moneys, and effects that the said Lorenzo Webber as trustee may be found charged with, as hereinbefore prayed.

"(4) That the purpose and object of the delivery of the \$6,000 note by Charles E. Lockwood and Fred S. Lockwood to the said Lorenzo Webber, trustee, be determined and adjudged, and the liability fixed thereon, and that, if said notes were given as additional security to the general indebtedness of Fred S. Lockwood, and upon a fair accounting there is a deficit equal to the whole or any part of the notes, then and in that case the property of the said Charles E. Lockwood, deceased, be made subject to a lien for the purpose of the enforcement and collection of the note.

"(5) That unless the parties to whom this property has been conveyed, or their grantees, pay such sum as the court shall find due upon this note within a reasonable time, that the deeds of conveyance to them of the property of the said Charles E. Lockwood, deceased, be set aside and held for naught, so far as the rights of the beneficiaries under the trust are concerned, and they be given a lien thereon, with power to sell, for the purposes of enforcing the decree.

"(6) That, after the application of such sum, whatever deficiency or shortage or balance, if any, there may be, that a judgment or decree be rendered against Fred S. Lockwood individually, and he be required to pay the same, in default thereof that execution issue in the usual form, and that the complainant have general relief.

"III. Considering the different grounds of the demurrer, I have no hesitancy in deciding that the ground of multifariousness is not well taken, and as a matter of fact it has not been seriously urged, either upon the briefs filed or upon the argument on the part of counsel for the defendants, and as a matter of fact

in their reply brief counsel for the defendants admit that the real object and purpose of the bill of complaint is to have allowed or get allowed against the estate of Charles E. Lockwood the note in question. Counsel for complainant takes the same view of the matter, and upon that question both counsel agree, and I think myself that such is the sole purpose and object of the bill. Therefore, under all of the holdings of the cases as I find them, the bill cannot be said to be multifarious. It seems to be the settled law that a bill is not multifarious if it be single as to its subject-matter and object thereof and the relief sought if all the defendants are connected, though differently, with the whole subject-matter of the dispute, and again, when the object of the bill is single, to establish and obtain relief for one claim in which all the defendants may be interested, or is not multifarious, although the defendants may have different and separate interests. *Puterbaugh's Mich. Chancery*, p. 21; *Payne v. Hook*, 7 Wall. (U. S.) 425. There are many Michigan cases upon the subject which are cited in the brief of counsel for the complainant that uphold this doctrine, especially the case of *Hulbert v. Detroit Cycle Co.*, 107 Mich. 81 (64 N. W. 950). In that case the complainant filed a bill for the sole purpose of impounding all the assets of the debtor to pay his debts, and it was held that he might join every person as a defendant to whom the debtor had conveyed his property, and it was stated to be the established rule that a creditor may make all such parties defendants, and thus avoid a multiplicity of suits, and that, though the matters set forth in the bill are distinct, yet, if justice can be administered between the parties without a multiplicity of suits, the objection of multifariousness will not prevail. Therefore I feel that I am obliged, under all the authority, to overrule the demurrers to this bill upon the ground of multifariousness.

"IV. A more serious question, to my mind, is that raised by the second ground of the demurrer, and that is that the question of whether or not the estate is liable should be determined by the probate court for Ingham county, and that the circuit court for the county of Ionia in chancery has no jurisdiction.

"It becomes necessary at the very outset to deter-

mine whether there is a deficiency or not. In fact, that was the point that ruled in the trial before the circuit court for the county of Ingham. There the court held, upon motion of counsel for the estate, that, the sale of the property being invalid and void, it was to be treated as if no sale had been made; also that there was no way in a court of law to determine whether there was any deficiency or not, and for that reason, as I understand it, the claimant was nonsuited.

"There is no question, I think, as to the general rule that the administrator representing an estate, when a party to a cause can bind by his acts the heirs of the estate, and moreover, the judgment of the court in an action of that character is binding upon all, and, that being true, it follows that the judgment of the circuit court for the county of Ingham is binding upon all of the parties, except, perhaps, the Portland Farmers' Elevator Company, and as to that it is not important or material, for the only interest that defendant has in the controversy is to protect its title which it received from Lorenzo Webber, trustee, and, knowing all the facts in relation thereto, and just what had been done, so that it took the title with full knowledge of how Webber obtained it and with notice of its weaknesses and defects, if any, it is not in a position to question the jurisdiction of the court in this case.

"The probate court for Ingham county has no power to determine the question of deficiency, or to grant any relief, under the circumstances. That has been ruled. Now, then, what court has jurisdiction? It cannot very well be questioned but what the parties directly in interest on the question of deficiency are the Portland Farmers' Elevator Company, Fred S. Lockwood, Lorenzo Webber, trustee, and the complainant and those in whose behalf the bill is filed. All of these are residents of Ionia county, and the property is located in Ionia county which was covered by the trust deed over which this difficulty arises, and so I take it that the question of deficiency, if any, is triable in this court, and no other court has jurisdiction.

"The question next to be determined is whether this note was given for the purpose alleged. Of course, so far as the demurrers are concerned, that fact is

admitted, and there is no occasion for the interposition of the probate court, but considering the answers, which deny the allegations in that regard, nevertheless has this court of equity power to determine that question under the facts and circumstances of the case? That seems to be the exact question raised by the second ground of the demurrer.

"The powers and jurisdiction of judges of probate courts in Michigan will be found in sections 12098 and 12099 of the Michigan statutes [5 How. Stat. (2d Ed.), 3 Comp. Laws 1915, § 13764], and it has been held uniformly that the probate court has exclusive jurisdiction in the matter of the allowance of claims against an estate with certain exceptions. See *Nolan v. Garrison*, 156 Mich. 397 (120 N. W. 977), also *Davis v. McCamman*, 165 Mich. 287 (130 N. W. 691).

"In *Holbrook v. Campau*, 22 Mich. 288, it was said:

" 'And we have no doubt that jurisdiction in those courts was meant to be exclusive, except as the court of chancery, in exceptional cases, might render them aid and assistance by means of such auxiliary remedies as might be needful to prevent wrong and injustice before the probate jurisdiction could be rendered effectual.'

"Applying these rules to the facts in this case, and the further rule that where, instead of a complexity of controversies between the parties with respect to the same subject-matter, the complexity arises from there being involved the several rights of more than two, each attempting adjustment and each requiring at law a separate action, equity will take jurisdiction of a suit to which all are parties, and therein adjust all rights and determine the whole controversy.

"I am satisfied that under ample authority this court has jurisdiction to determine not only the question of the deficiency, but the further question as to whether the note was given for the purpose claimed and set forth in the bill. In other words, equity once having acquired jurisdiction, it will retain it to give such full relief as will finally dispose of the entire controversy, and, this being the view of the court, the demurrers upon the ground of want of jurisdiction of this court are overruled.

"V. It has been urged very strongly in the brief

and in the argument that the demurrer should be sustained as to the defendants, the heirs of Charles E. Lockwood, to whom he conveyed his property, and their grantees, for the reason that, although this court might have jurisdiction to determine the question of deficiency, yet it had no jurisdiction over the property in Ingham county, and could not set aside any conveyance made for the purpose of aiding and assisting any decree rendered by this court by way of a judgment upon such note or otherwise.

"The statutes of this State upon the question of reaching property where the same has been conveyed when there is not sufficient assets to pay the debts of the deceased will be found in sections 11064, 11074, 11075, and 11076 of the Michigan statutes [4 How. Stat. (2d Ed.), 3 Comp. Laws 1915, §§ 13849, 13859-13861]. Under this statute H. J. Watson could file a bill to set aside those conveyances, and, if he refused to do so, then the creditors could proceed direct. See *McFarlan v. McFarlan*, 155 Mich. 655 (119 N. W. 1108). In that case it has been held by the Supreme Court of this State that there is no question but what a court of equity in a direct proceeding instituted on behalf of a creditor, upon leave of the court, where the administrator has refused to act, could file a bill for the purpose of reaching the property.

"Now, then, applying also the rule as to settling all questions in controversy, and once for all ending the litigation and avoiding a multiplicity of suits, I am satisfied that the circuit court for Ionia county, in chancery, has power to make the necessary orders and decrees to the end that the property described in the bill as belonging to the estate of Charles E. Lockwood, deceased, may be charged with this debt in this case, and that the conveyances may be set aside, if necessary to satisfy the same, and for that reason I think that this ground of the demurrer must be overruled. Moreover, it is my opinion that section 11951 of the Michigan statutes [4 How. Stat. (2d Ed.) 3 Comp. Laws 1915, § 12340, subd. 12], providing that in every suit in chancery affecting real estate, and where real estate is situated in different counties, it shall be competent to file a bill in equity in either of the counties in which the real estate or a part of it may be sit-

uated, and that this section of the statute gives this court jurisdiction.

"VI. It is claimed that the bill charges no fraud, and therefore a court of equity has no jurisdiction. I have not been impressed with this point very much. The bill, in a way, is to reach property that has been conveyed illegally by a trustee; that is, the property conveyed to the Portland Farmers' Elevator Company. There can be no question, under the law, but what this property can be reached whether the trustee acted in fraud or good faith. That question was settled in *Gibney v. Allen*, 156 Mich. 301 (120 N. W. 811). So in this case relief does not depend upon the question of good faith of Webber in selling this property. It is purely a question of whether the matter has become so mixed and the property placed in that condition that without the aid of the court the trust cannot be carried out, and it appears that such is the situation. The property under the trust was conveyed by Webber, evidently in good faith, but perhaps under a mistaken view of the law, and it may be true, at least I shall assume it is true, and that Judge Wiest was correct in his holding that it was the same as no sale, and therefore without the interposition of a court of equity the complainant and his cobeneficiaries are left without remedy, and therefore, under such circumstances, I have no hesitancy in holding that it is not necessary to charge fraud to give the court jurisdiction, and therefore I feel compelled to overrule this ground of the demurrer.

"VII. I do not think it is necessary to spend any time upon the last ground of the demurrer, that is, that the probate court or the circuit court for the county of Ingham having once assumed jurisdiction and disallowed the claim, it becomes *res adjudicata*, and this court has no jurisdiction in the premises.

"A judgment, to be a bar to a subsequent action, must have been rendered upon the merits of the subject-matter, and between the same parties no claim of this kind can be made or is made, as I understand it, and, under the authority of Michigan and elsewhere, the fact that the circuit court for Ingham county having held that until the deficiency was determined there could be no recovery, and upon that ground nonsuited

the claimant, it would be absurd to hold that that ruling was a bar to any proceedings taken thereafter for the purpose of determining that very question. I think the case of *Laird v. Laird's Estate*, 127 Mich. 24 (86 N. W. 436), settles the question beyond any controversy, and it is unnecessary to discuss it further, and that ground of the demurrer is overruled."

We are unable to agree with the conclusion of the learned circuit judge that because the circuit court of Ionia county, in chancery, acquired jurisdiction to enter into an accounting and determine the deficiency of an insolvent estate, and in so determining pass upon the quality and value of its real and personal assets, including land within that county and the Charles Lockwood note, it thereby acquired jurisdiction to set aside deeds given by Lockwood to lands in Ingham county. He is not claimed to have owned land in "different counties." While the administrator, or, in case of his refusal, creditors, might file a bill in the county where the land lies to set aside those conveyances, if the assets of the estate otherwise proved inadequate to pay its debts, the subject-matter is purely local, and only the county in which the land is located has jurisdiction for that purpose. *Chapin v. Circuit Judge*, 104 Mich. 232 (62 N. W. 351).

The decree will therefore be modified accordingly, sustaining the demurrer of the heirs of Charles Lockwood to whom he conveyed his land in Ingham county and their grantees, with costs to them, and otherwise affirmed, with costs to complainant against the remaining defendants.

STONE, C. J., and KUHN, OSTRANDER, BIRD, MOORE, BROOKE, and PERSON, JJ., concurred.

In re MCINTYRE'S ESTATE.

DOYLE v. CLANCY.

1. WILLS—EVIDENCE—UNDUE INFLUENCE.

In a proceeding for the probate of a will, opposed by nephews and nieces of the testatrix, who devised the greater part of her estate to charitable institutions of the Catholic church, evidence reviewed, and *held*, insufficient to present a question of fact on the issue of undue influence by her religious advisers.

2. SAME—SUFFICIENCY OF PROOF.

Undue influence, to vitiate a will, should be more than influence, and must coerce the testator against her will, causing her action to be under compulsion or restraint such as to affect or destroy her free agency.

3. SAME—PROOF—CIRCUMSTANTIAL EVIDENCE.

It need not be proved by direct evidence, but can be established by indirect proofs or circumstantial evidence from which it may be inferred that such influence was exerted.

Error to Kent; McDonald, J. Submitted April 7, 1916. (Docket No. 37.) Decided September 27, 1916.

Emanuel J. Doyle presented for probate the last will of Ann McIntyre, deceased. From an order admitting the same to probate, Charles Clancy and others appealed to the circuit court. Judgment for proponent on a directed verdict sustaining said will in part and for contestants on question submitted to the jury. Proponent brings error. Affirmed as to directed verdict and reversed as to balance.

Emanuel J. Doyle (Jacob Kleinhans, M. L. Dunham, Willard F. Keeney, and Thomas A. E. Weadock, of counsel), for appellant.

Lombard, Hext & Washburn and Charles E. Ward,
for appellees.

MOORE, J. October 9, 1908, Ann McIntyre made a will reading as follows, omitting the formal parts:

"First. I direct that all my just debts and my funeral expenses be paid.

"Second. I give, devise and bequeath all of the rest, residue and remainder of my estate both real and personal of which I shall die seised or possessed, or to which I shall be entitled at my decease, and wherever the same may be situated unto Emanuel J. Doyle of the city of Grand Rapids, Michigan, in trust, however, for the following purposes: * * *

"(c) And to convert all of my property, both personal and real into money as soon as the same can be done without loss to my said estate or any part thereof. * * *

"(e) And after my said estate has all been converted into money by my said trustee as above provided, that my said trustee shall divide all of the proceeds thereof, that is to say: All of the moneys derived from the sale or sales of my said estate equally share and share alike between St. John's Orphan Asylum of the city of Grand Rapids, Michigan, and the Little Sisters of the Poor of Grand Rapids, Michigan, that is, that each of the last-named institutions shall have one-half of the proceeds of my whole estate.

"(f) The above division and disposition of the proceeds of my estate is made out of a desire I have that all of my property should be given to charity after my death, I having no children or grandchildren living.

"Third. In compliance with and in obedience to a clause in the last will and testament of my late husband, John McIntyre, authorizing his executor and trustee, Emanuel J. Doyle, named in his said last will and testament, who is also my said executor and trustee, to dispose of his estate as I, his wife, should direct. I direct and desire under the power given me in said clause in said last will and testament of my said husband that the estate of my said husband, John McIntyre, be disposed of in exactly the same way as near as the same can be done as my own

estate shall be disposed of, under the foregoing provisions of this my last will and testament; that is to say: That after my death that all the estate of my said husband, John McIntyre, both personal and real, be converted into money by my said trustee as soon as the same can be done without sacrificing the whole or any part of said estate, or without any necessary loss thereto, or to any part thereof, and that during the time my said trustee is so converting the said estate of my said husband into money that he shall have power to make all necessary repairs thereon, pay taxes thereon, rent and collect rent for the whole or any part thereof, and sell and dispose of the whole or any part thereof when in his judgment he can obtain a reasonable price or value therefor, and that when the whole of the estate of my said husband is converted into money as aforesaid by my said executor that he divide all the proceeds or moneys received by him for said estate equally share and share alike between St. John's Orphan Asylum of the city of Grand Rapids, Michigan, and the Little Sisters of the Poor of Grand Rapids, Michigan, that is to say: That each of said last-named institutions shall receive one-half of all the proceeds derived from the estate of my said husband John McIntyre. * * *

"(i) And that my said executor and trustee shall be allowed out of said estate the sum of twenty-five hundred dollars per year in full payment and settlement for all his services of every nature and kind in reference to the management, sale and distribution both of my estate, and that of my said husband as above provided.

"*Fourth.* I hereby nominate and appoint Emanuel J. Doyle, of the city of Grand Rapids, Michigan, to be the executor and trustee of this my last will and testament."

Then follows the closing part of the will, which is in due form.

On October 12, 1909, Mrs. McIntyre made a codicil to her will in part as follows:

"Know all men by these presents: That whereas I the undersigned, Ann McIntyre, of the city of Grand

Rapids, Michigan, did on the ninth day of October, A. D. 1908, make, execute, publish and declare my last will and testament in writing, bearing date the day and year aforesaid.

"And whereas, I now desire to make certain changes therein and modifications thereof and additions thereto:

"Now, therefore, I, the said Ann McIntyre, being of sound mind and memory, do make, publish and declare this my codicil to my said last will and testament in manner following, that is to say:

"After the payment of my just debts and funeral expenses as provided in said will, I give and bequeath to my niece Jennie McIntyre, of Ann Arbor, Michigan, the sum of five thousand dollars.

"And to my nephew Don McIntyre, of Ann Arbor, Michigan, the sum of five thousand dollars. And to my nephew James Clancy, of Escanaba, Michigan, the sum of ten thousand dollars.

"And whereas, by my said last will the residue of my estate after being converted into money is directed by the trustee therein named to be divided between the St. John's Orphan Asylum of Grand Rapids, Michigan, and the Little Sisters of the Poor of Grand Rapids, Michigan; and whereas, the said St. John's Orphan Asylum is not an incorporated institution, but is under the management and control of religious associations and authorities, I direct that the trustee named in said will so dispose of, expend, lay out, or invest the moiety of such residue in said will directed to be for the benefit of the said St. John's Orphan Asylum in such manner as in his judgment shall be most beneficial for the inmates of the said St. John's Orphan Asylum, and to that end he is authorized and empowered to place the same in the hands and control of such persons or corporation as shall be in charge of said St. John's Orphan Asylum to be used only for the purposes aforesaid.

"And I further declare that by the term Little Sisters of the Poor mentioned in my said will is meant and intended the Home for the Aged, Little Sisters of the Poor, a corporation located at Grand Rapids, Michigan, and this direction and explanation shall apply to the disposition of the estate of my deceased husband,

John McIntyre as well as to the disposition of my own estate.

"And I do hereby ratify and confirm all and singular the provisions of my said last will and testament except as changed and modified by this my codicil thereto."

This codicil was executed in due form.

Mrs. McIntyre died December 26, 1910. Her will was offered for probate. Some of her nephews and nieces contested its probate on the ground of mental incompetency and undue influence. The case found its way to the circuit court, where it was tried before a jury. Upon the conclusion of the testimony the counsel for the proponent requested the court to direct a verdict in his favor on two grounds:

(1) That there was no evidence to submit to the jury in support of the contestant's claim.

(2) If there was such evidence, it only amounted to a scintilla, and it was the duty of the court to direct such verdict.

This request was denied. The court said that he would instruct the jury, as a matter of law, that the codicil, so far as it related to the legacies to James Clancy, Miss McIntyre, and her brother, and the provision in regard to the appointment of Judge Doyle as executor and trustee, and his compensation, were valid, and he would also instruct the jury that she had sufficient mental capacity to make this will and codicil, and leave to them only the question of undue influence, and the jury were instructed accordingly. The jury found that the will and codicil were not the last will and testament of Mrs. McIntyre, except that the provisions pertaining to the appointment and compensation of Judge Doyle and the legacies to Don McIntyre, Jennie McIntyre, and James Clancy were valid. The proponent moved for a new trial, which motion was overruled. It was renewed, and again overruled.

The contestants did not take any exceptions to the instructions of the court to the jury, nor did they take out any writ of error. The proponent brought the case here by writ of error.

It was conceded in this court by counsel in response to a question put to them by the court that the verdict of the jury must be affirmed as to the legacies to James Clancy, Jennie McIntyre, and Don McIntyre, and in regard to the appointment of Mr. Doyle as executor and trustee and his compensation.

The printed record contains more than 2,800 pages. The briefs are very voluminous. The case was argued orally at length. We may as well say at the outset that an examination of the record convinces us that the trial judge was right in saying Mrs. McIntyre was competent to make the will and codicil.

Before entering upon a discussion of the assignments of error, of which there are nearly 300, it will be helpful to take a general view of the situation as disclosed by the record.

Mrs. McIntyre's maiden name was Clancy, and the contestants, numbering 19, are nephews and nieces, the children of her deceased brothers, James, Dennis, and Edmund Clancy, who died before the will and codicil were executed. All of the widows of these brothers are dead. John Clancy, a brother of Mrs. McIntyre, was a bachelor who made his home with the McIntyres for years. He died in 1883, leaving a large estate. By his will he gave to Mrs. McIntyre and her husband jointly the homestead with all its contents on condition that neither of them should make any charge or claim against him or his estate for any services rendered or to be rendered. He also gave to the Roman Catholic bishop of the diocese of Grand Rapids the sum of \$60,000 to purchase ground and to erect thereon an orphan asylum, the title to be in the bishop and his successors in office forever.

After making other bequests not material here, he gave the residue of his property to his three brothers, James, Edmund, and Dennis, and to his sister, Mrs. McIntyre, to be divided equally between them. Under the residuary clause of the will Mrs. McIntyre and her three brothers each received \$50,000. Mr. and Mrs. McIntyre had only one child, a son, John D. McIntyre, who died at the age of 52. In May, 1906, Mrs. McIntyre broke her hip, and a few months later she broke it again, which left her a cripple for life. After she recovered from the second fracture she had to be helped up and down stairs, but could get around the house with crutches. She went down town in her wheel chair and sat on the veranda. In December, 1906, John McIntyre, the husband of Ann McIntyre, sent for Emanuel J. Doyle to come to his house to see him about some business. Judge Doyle is a lawyer, and has been police judge of the city. Later Judge Doyle, at the request of Mr. McIntyre, drafted a will for him which was executed January 2, 1907. By this will he gave his wife the use of all of his property for life, subject to a provision which devised all of his estate to Judge Doyle in trust to manage and care for the same and pay the necessary expenses, and from the income to pay to his son, John D. McIntyre, \$15 a week during his natural life; the balance of his estate to be disposed of by his executor and trustee as his wife might will and direct. He appointed Judge Doyle executor and trustee with large powers. Mr. Doyle had from that time charge of Mr. McIntyre's entire business and gave checks for his expenses. John McIntyre died February 24, 1907.

After this will was made Judge Doyle went to the McIntyre house three or four times a week, staying from a few minutes to half an hour during John McIntyre's lifetime. Commencing in the summer after Mr. McIntyre's death Judge Doyle frequently took his

dinner at the McIntyre house on the invitation of John D., the son, or Mrs. McIntyre, and made much more frequent visits. After John D.'s death, which occurred September 17, 1908, Mrs. McIntyre insisted that he should come there regularly to his noonday meals, and as a rule he did so, and sometimes when requested he stayed there overnight.

Mrs. McIntyre's general health was good up to within a few days of her death, which occurred December 26, 1910, when she was upwards of 80 years of age. Mrs. McIntyre was a Roman Catholic, and had a pew in the cathedral for 25 years or more. Before she was hurt she went to church, how frequently is a matter of dispute, but she was undoubtedly an earnest Catholic. She was very friendly with her niece Jennie McIntyre. Except her nephew James Clancy and her niece Mrs. Griffin, Mrs. McIntyre was a comparative stranger to all her nephews and nieces on the Clancy side. James Clancy called on her occasionally as he was passing through Grand Rapids. He is not a contestant of the will. Mrs. Griffin married in January, 1892. She visited Mrs. McIntyre before her marriage, and Mr. and Mrs. McIntyre attended her wedding in Ann Arbor. After she was married she and her husband lived in a brick house belonging to the McIntyres adjoining their homestead. After a time the friendly relations between Mrs. McIntyre and Mrs. Griffin ended for causes which are claimed to be due to Mr. Griffin.

St. John's Orphan Asylum is a diocesan institution under the control of the bishop, which was founded by John Clancy's bequest of \$60,000. When this case was tried, 139 children were housed in this building, and it was crowded. If the interior was finished, it would accommodate from 500 to 600 children. Destitute and orphan children between the ages of 4 and 14 years are taken into this home and are fed, clothed,

and educated. The object of the home is to make good citizens of the children.

The record abounds with testimony that Mrs. McIntyre was proud of John Clancy for founding the home for orphans and of the good his money was doing long years after he was dead, and that she thought there was no greater charity than helping little children. The record shows that in 1910, when the last addition to the orphans' home was being built, there was a lack of funds to complete it, and Mrs. McIntyre told Sister Paschal that it was too bad to have a building like that stand for the want of money when it was necessary for the children, and she said: "I will see what I can do, and perhaps I can help out." She sent Judge Doyle to the home to look the building over and to ask the mother superior if they were in need of funds. Judge Doyle informed her of the condition of affairs, and after a day or two she gave them a check for \$2,500. She was in the habit of sending a Christmas box to the home containing candy, oranges, and cake.

The Little Sisters of the Poor is another institution in the city of Grand Rapids managed by the Catholics. At the time of the trial it had 150 old people. Mrs. McIntyre was also interested in this institution, and often spoke of the children and the old people. Mr. McIntyre always sent them a present every Christmas, and she kept it up after his death. Her husband favored the Little Sisters of the Poor, and she the orphan asylum. Mrs. McIntyre said it was real charity to take care of little children and old people.

The record shows that in July, 1908, Mrs. McIntyre began to talk to Judge Doyle about making her will, and he made a rough draft of one which was completed August 7, 1908, which draft was submitted to former Circuit Judge Grove. This will disposed of her property much the same as the will in controversy,

including the disposition of the estate left by her husband. This will made provision for the son, John D. McIntyre. Before it was executed he died. After his death, and during the two weeks before October 9, 1908, she talked to Judge Doyle about her will several times. He drafted another one in accordance with her instructions leaving out the provisions for the son. It was executed in Mrs. McIntyre's bedroom about 11 a. m. The subscribing witnesses were Dr. Barth, who had been her family physician for 27 years, and Alberta Van Wyck, who was a stenographer in Judge Doyle's office. Before Mrs. McIntyre signed it, Judge Doyle read the attestation clause, and then Mrs. McIntyre signed first, and requested Dr. Barth and Miss Van Wyck to sign as witnesses which they did. The persons present besides Mrs. McIntyre were Judge Doyle and the two witnesses. Mrs. McIntyre was sitting up at a little table in her usual chair. She selected these witnesses herself.

There is testimony that before her husband died they had agreed to give their property to the orphans and the Little Sisters of the Poor, because they thought there was no better charity than giving to these two institutions. There is testimony that Mrs. McIntyre said that her brother John Clancy must have had a great head on him, and she had been appreciating it more and more how he devised this plan of St. John's Orphan Asylum for devoting his money to charity. She said, "He must have had a great mind"; also, "he originated the St. John's Orphan Asylum, founded it, and left \$60,000 to get it started." She said she wanted to supplement his efforts, that these little children were not able to work, and that they had no parents, or wayward and worthless parents, and somebody must support them, and she said she thought it was real charity to clothe, feed, and lodge these little children, and she wanted her money to go to

charity. She also said that these old men and women at the Little Sisters of the Poor were not able to work; that Mr. McIntyre always favored the Little Sisters of the Poor. They were his choice, and she knew he would want her to do as much for them as for St. John's Orphan Asylum, and she wanted the property divided equally between these two institutions.

There are many interesting questions presented by the assignments of error. There is, however, one pivotal question, the answer to which will decide whether it is necessary to discuss and decide the other questions. We have already determined that Mrs. McIntyre was competent to make the will and codicil. The other question is whether there was sufficient evidence of undue influence to take the case to the jury. The testimony of one of the domestics who was in the employ of the McIntyres for several years is said to sustain the charge of undue influence. In one side of the room occupied by Mrs. McIntyre was a door before which in her room was a cheval dressing case which concealed the door from an occupant of the room. The domestic, Mrs. Durand, opened this door slightly. She says she did this so that she could more readily hear the bell when Mrs. McIntyre rang for her. Her testimony is that when a priest or the sisters visited Mrs. McIntyre she repaired to the door and listened; her presence being unknown to Mrs. McIntyre and her visitors. Her testimony is:

"Q. At the time of Mr. John McIntyre's death were you about the house at the time of the funeral?

"A. Yes, sir.

"Q. Up to that time had you seen any priests or sisters about the house?

"A. No, sir; there wasn't none. * * *

"Q. Now, when young John died, did they have any services at the house?

"A. Why, yes; when he died there was priests there, and after he was dead the Little Sisters and some of

the children from St. John's Orphan Home come up and prayed around the casket.

"Q. When did you first notice any of the priests or sisters coming about the house?

"A. Well, right after Mr. McIntyre died.

"Q. About how long after he died did they commence to come there?

"A. It might have been a month or so, little more.

"Q. How frequently did they come during the first six months after he died?

"A. Oh, not so—not so very often.

"Q. Give us your best recollection.

"A. Couple times a week.

"Q. Did you know Father Reid?

"A. Why, yes; I know him well.

"Q. Did you know Father Schmitt?

"A. Yes.

"Q. Did you see them about there?

"A. Yes.

"Q. And were they the ones that came?

"A. Yes, sir.

"Q. You say they commenced coming somewhere along a month after Mr. McIntyre's death?

"A. Yes, sir. * * *

"Q. And did you see any of the sisters come?

"A. Yes, sir.

"Q. I want to get at the earliest time that you remember their coming, the sisters. How soon after Mr. McIntyre's death did they come?

"A. They didn't come so often; I don't just remember how many times they would come, or how soon.

"Q. You don't remember how soon they came?

"A. No; I don't. * * *

"Q. Now, I want to call your attention this time to what you observed in relation to the priests coming there. I refer now to the time up to Mr. John McIntyre's death. Had you seen any there before that?

"A. John McIntyre?

"Q. Yes; the old gentleman before he died.

"A. No; I never seen any there.

"Q. Were there any there at the house that you saw during the period, the time of his death, while the body was there in the house, before the body was taken away from the house?

"A. Why, I think there were to see Mrs. McIntyre.

"Q. What is that?

"A. To see Mrs. McIntyre—Father Reid.

"Q. You think Father Reid did come?

"A. Yes.

"Q. To see Mrs. McIntyre?

"A. Yes.

"Q. After Mr. McIntyre's death what did you observe with reference to the priests coming there to the house? Just tell whether you saw them come, and how often.

"A. Why, yes; they used to come.

"Q. Who come?

"A. Father Reid and Father Schmitt; the sisters.

"Q. Did you notice anything with reference to whether they came oftener or not after Mr. McIntyre's death?

"A. Why they didn't come so very often about three or four times a week. * * *

"Q. Do you know how long that continued in that way?

"A. Why, until John's death.

"Q. Until John D.'s death?

"A. Yes; they used to come quite often; more than that after that.

"Q. After young John died how often did they come?

"A. Why, two or three times a day.

"Q. Three times a day?

"A. Yes. * * *

"Q. Following Mr. McIntyre's death, I wish you would tell this jury what you observed and heard in reference to the priests and their visits to Mrs. McIntyre's; I mean just following, in the earlier part, what you know of their coming there, and what they said to her with reference to her property. I refer now to Father Reid and Father Schmitt?

"A. Why, they used to tell her—Father Schmitt would tell her that she should leave her property to the church, and that she ought to do for it, and that Mr. McIntyre was in purgatory, and that she had to give them money to get him out of purgatory, to pray for him on Sunday at the cathedral.

"Q. Have you heard them tell her that?

"A. Yes, sir.

"Q. In the beginning they first commenced coming there and telling her that; what was her attitude towards them?

"A. She used to call Father Schmitt a 'little shrimp'; she says she guessed she knew what she wanted to do with her property; he didn't have to tell her.

"Q. And that was when they first commenced coming there?

"A. Yes. * * *

"Q. Now did they keep on coming after?

"A. Yes; more all the time.

"Q. Whether or not the sisters continued to come more frequently?

"A. Yes; they were there, too,

"Q. And what have you seen and heard in connection with their talk with Mrs. McIntyre in her room?

"A. Well, I never heard what they said; I couldn't understand.

"Q. What had you seen them do?

"A. They would kneel down in front of her feet and kiss her hand and pray, but I could not understand what they said.

"Q. How frequently have you seen them do that?

"A. Oh, sometimes every day, or every other day.

"Q. Were they doing anything of the kind before Mr. McIntyre's death?

"A. No, sir.

"Q. Do you know anything about their bringing her any books, Catholic, or, that is, related to the Catholic religion, for her belief?

"A. Yes; they brought her books to read.

"Q. Who brought them?

"A. Well, Father Schmitt and Father Reid, and I don't know whether the sisters did. I never seen them bringing any. * * *

"Q. Now, how frequently did you hear Father Schmitt tell her that her husband was in purgatory and they need this property to get him out?

"A. Oh, I don't remember how many times, but—

"Q. Well, did you more than once?

"A. Yes, sir.

"Q. Whether that continued on through the time that you were there?

"A. Well, they used to talk about her property every time they would come.

"Q. State whether or not that was the topic of conversation largely while they would be there?

"A. Yes, sir; they used to talk about it all the time.

"Q. In the beginning following the death of her husband state whether or not at that time she fell in with the idea, or gave them anything as far as you knew.

"A. She used to give them money.

"Q. I mean in the beginning, right after Mr. McIntyre died?

"A. No; she didn't use to give them any money then that I know of; I don't remember of it.

"Q. State whether or not that was the time when she used to call Father Schmitt a 'little shrimp.'

"A. Yes, sir.

"Q. What did she say—I want to get that clearly out—as to just what she said that indicated her reason for calling him that?

"A. Well, he used to be so persistent that he wanted to make her give the property to the church, and she guessed she would know what she wanted to do with the property, and she didn't like him.

"Q. About how long after her husband's death occurred did she commence giving them money, if she did, as you have suggested?

"Mr. Kleinhans: Who is 'them'?

"Mr. Lombard: I mean the priests.

"Mr. Kleinhans: Which one?

"Mr. Lombard: Well, either one.

"A. Well, Father Reid used to give the communion.

"Q. At the house?

"A. Yes, sir. And I used to get her bag, and she used to give him \$20 gold pieces.

"Q. How frequently did that happen?

"A. Well, I don't just remember, but quite often.

"Q. You knew Father Reid also?

"A. Yes, sir.

"Q. Did you hear any conversation between him and her with reference to the property there where she lived?

"A. Yes, sir; he wanted the corner for a cathedral.

"Q. What did you hear her say to him about that? Just tell what he said to her what he wanted.

"A. What Father Reid wanted?

"Q. Yes; what did you hear Father Reid say to Mrs. McIntyre?

"A. That she ought to do for the church and to give a corner for a cathedral, for Father Reid's cathedral.

"Q. That is the corner where she lived at that time?

"A. Yes; the corner where she lived.

"Q. Just explain to the jury how you came to hear their conversations?

"A. Well, they used to come up there so much, and I heard—thought that they were talking to her, you know, and I used to go up the back way and listen to that door, up the back stairway. * * *

"Q. How many times did you hear them, either Father Reid or Father Schmitt, speak of her husband being in purgatory?

"A. Well, I don't remember how many times, but they used to tell her quite often that they hadn't said a prayer for him on this Sunday because she would have to give them more money to say another prayer that next Sunday for him in church, you know, to get him further out of purgatory.

"Q. State whether or not that condition continued up to the time you left there; whether they still were doing that when you left there.

"A. They didn't—I didn't hear them say anything about it after her will was made.

"Q. Not after the will was made?

"A. No, sir.

"Q. What did you observe about the frequency of their coming there after the will was made; did they come as often as they did before?

"A. No, sir; they did not. * * *

"Q. After these books had been brought there and the priests and the sisters had been going there for some months, did you ever hear her say anything more, or call Father Schmitt a 'shrimp,' or anything further?

"A. No, sir; she never used to say anything about that.

"Q. She changed her attitude in the matter?

"A. Yes, sir. * * *

"Q. She received the injury about four weeks before you were married?

"A. Yes, sir.

"Q. And state whether or not she was then confined to the bed at the time of your marriage?

"A. Yes, sir. Yes; she was.

"Q. And from that time on was she ever able to help herself or get about?

"A. No, sir; she always had to be helped; she couldn't get in or out of bed.

"Q. And from that time on did you ever know of her going to church?

"A. No, sir; she never went to church.

"Q. Did you know of the priests or sisters visiting her at the time she was injured; did you ever see them around there?

"A. Why, I don't remember, but I think they came once or twice.

"Q. You think they came once or twice?

"A. Yes."

On the cross-examination she testified in part:

"Q. Now, while Mrs. McIntyre was in bed with this broken hip did either of her pastors or any pastors of the Catholic Church come there to see her?

"A. Yes; I think Father Reid was there.

"Q. Father Reid?

"A. Yes. * * *

"Q. What was Father Reid asking her to give him at that time?

"A. Didn't ask for anything.

"Q. Was she giving him \$20 gold pieces or \$10, or what?

"A. Well, I don't remember of her giving anything.
* * *

"Q. Now, you have told us that you saw Father Reid there in 1906 at the time she had this broken hip. Did Father Reid or Father Schmitt call there occasionally from that time on until the death of John McIntyre her husband?

"A. Why, I don't remember of their only being there once.

"Q. Who?

"A. Father Reid.

"Q. That was when she was upstairs with a broken hip wasn't it?

"A. Yes, sir; that is all I seen him.

"Q. Didn't you ever see Father Schmitt there after that time and before John McIntyre died?

"A. Before?

"Q. Yes.

"A. I don't remember whether he was or not. * * *

"Q. After John McIntyre's death how long after his death was it before you used to see these priests coming there all the time?

"A. Oh, they came right away. * * *

"Q. Do you tell the jury that right after John McIntyre was buried that you used to see Father Schmitt or Father Reid going there nearly every day, did you?

"A. Well, I don't know. * * *

"Q. From the time John McIntyre died in February, 1907, the priests and sisters used to come pretty frequently from that time up to the time John D. died, didn't they?

"A. Yes.

"Q. And were there more than two priests that used to go there, Father Schmitt and Father Reid?

"A. That is all I saw.

"Q. Who came there oftener, Reid or Father Schmitt?

"A. Father Reid.

"Q. Who would stay longer, Father Schmitt or Father Reid?

"A. Well, I don't know who would stay the longest. * * *

"Q. When you went back to work you began listening right away, didn't you?

"A. Well, I don't know whether I did right away.

"Q. Where were Father Reid and Mrs. McIntyre talking the first time you began listening?

"A. Why, in her room. * * *

"Q. What time of day was it that you went up there to listen?

"A. Well, both times, all day, whenever they would be there.

"Q. All day; I see.

"A. Not all day, but I mean whenever they would be there, the morning or the afternoon.

"Q. Up to the time that you began to listen up this

back stairway there had you ever overheard any conversation between Father Reid and Mrs. McIntyre?

"A. Before I commenced to listen?

"Q. Yes.

"A. No; I don't remember. * * *

"Q. What did Mrs. McIntyre say that day?

"A. She never said very much.

"Q. What did Father Reid say upon that occasion?

"A. Well, he kept telling her that he wanted the house the corner for a cathedral, and she ought to give it to the church to do for her. That is before John D. died.

"Q. Is that just what he said? Have you told us just what Father Reid said?

"A. Well, I couldn't word it word for word the way he said it, but that was what I understood.

"Q. And what did she say in reply?

"A. She never used to say very much about that at first.

"Q. You say Father Reid wanted her to give that place, that corner for a cathedral, for his church, or for his cathedral?

"A. Yes.

"Q. For his cathedral. Just what was the language; what was it Father Reid said now; how was it he said it?

"A. Well, I don't remember how he worded it.

"Q. You tell it as you think he said it?

"A. Well, that he wanted—* * *

"Q. Give it as near as you can.

"A. Well, I don't know how to express myself.

"Q. Express it just as Father Reid did.

"A. Well, that he wanted the corner for a cathedral and how nice it would be if he had a cathedral on the corner, and that she ought to give him the corner for a cathedral or a church.

"Q. Cathedral or a church. What else did he say?

"A. Well, I don't remember. * * *

"Q. Tell what Father Reid said just as near as you remember it?

"A. Why, I don't know what he exactly said.

"Q. Well, we don't. Tell us just as near as you remember what Father Reid said from that time on.

"A. Well, he talked about her property there.

"Q. What did he say? Just tell us what he said.

"Mr. Lombard: She is trying to, the best she can.

"A. Well, I don't know just what he did say. * * *

"Q. Have you now told the jury all that you can remember that you heard said there between Father Reid and Mrs. McIntyre on that first occasion of your eavesdropping?

"A. Why, I don't know whether I did or not.

"Q. Can you think of anything more that you heard that time?

"A. I can't just now. * * *

"Q. Do you now say that you heard Father Schmitt use that language to Mrs. McIntyre before John D. McIntyre died?

"A. Yes.

"Q. Then, as I understand you, Mrs. Durand, Father Reid wanted Mrs. McIntyre to give the homestead there for cathedral purposes, and Father Schmitt wanted her to give money for masses; was that what they were asking for?

"A. Yes; and to give the property to the church, and—

"Q. Who was it said she ought to give the property to the church?

"A. Oh, they both talked about it. Father Schmitt said that she should give money to get Mr. McIntyre through purgatory, and to pray for him on Sunday in church, and to get him out that much farther, and that she ought to do for the church now while she was alive, and that she couldn't do it afterwards, and that she had a lot of money and she ought to do it. That is Father Schmitt. * * *

"Q. What you just told us, was that what Father Schmitt said the first time?

"A. I don't know whether it was the first time or the last time.

"Q. You can't tell what you did hear him say the first time, can you, and be sure about it? What did Mrs. McIntyre say when Father Schmitt said that?

"A. I never could just exactly hear what she would say; she would talk so low. * * *

"Q. And who did Father Reid say she ought to give the money to for masses? Did Father say she ought to give money for masses or to get him out of purga-

tory, which was it Father Reid said, what language was it he used?

"A. I don't know who got the money.

"Q. What did he say? Did he say, 'You ought to give money for masses,' or did he say, 'You ought to give it to get your husband out of purgatory'?"

"A. He said that, too.

"Q. Which was it he said? Just tell us what Father Reid said about that.

"A. To get him out of purgatory, and she ought to do for the church, and that he wanted the corner for a cathedral. * * *

"Q. I know, but what was it he said besides what you have said?

"A. Why, I don't know.

"Q. Now, you can't think of anything else Father Reid said, can you? Well, if you can't, what did you hear Father Schmitt say? You have told us before recess that Father Schmitt said she ought to give money for masses, or to give money while she was alive; she couldn't do it after she was dead. Now, what else, if anything, did Father Schmitt say?

"A. And that she had means, and that she ought to do for the church.

"Q. What else did Father Schmitt say?

"A. That she ought to leave it to the church and do for the church and for the sisters to help them.

"Q. What else did Father Schmitt say?

"A. Why, I don't remember exactly now.

"Q. You can't think of another thing. Now, what did you use to hear the sisters say when you were listening at the door? I don't know, but you have told us you could not hear what they said.

"A. No, sir."

Both of the priests referred to by this witness were sworn and denied in the most emphatic language that they made the statements to which Mrs. Durand testified, and that they had no knowledge of the making of the will. Father Schmitt says he made but two requests for funds of Mrs. McIntyre, and one was that she contribute toward the purchase of a chime of bells, and that she did so, and that he made a re-

quest for a contribution to procure a stained glass window which she said she would consider, and that she never complied with his request.

Father Reid testified in detail in relation to his visits, which began when Mr. McIntyre was alive, and at a time when Father Reid was building a little church just outside of the city limits. Soon after this visit Mr. McIntyre sent him a check for \$50. He also testified that during the three or four years he visited the McIntyres gold coins were given to him by Mrs. McIntyre amounting approximately to \$220. Some of the sisters were sworn as witnesses. They as well as the priests said their visits were made only when they were sent for or when they were invited to come, and that they never sought to influence Mrs. McIntyre in the disposition of her property.

We have quoted all of the testimony of Mrs. Durand bearing upon the question of undue influence. If we eliminate a consideration of its doubtful source and give to it the fullest probative force, does it constitute undue influence within the meaning of the law? It is to be observed that Mrs. Durand in her testimony did not give the replies made by Mrs. McIntyre to the various suggestions made to her by the priests. She says she could not hear them.

It is also to be noted that, if Father Reid ever requested that the corner lot be given him for a cathedral, his request was not heeded, and that, if Father Schmitt ever solicited property to pay for masses and the giving of prayers to get souls out of purgatory, these suggestions were not acted upon by provisions in the will for any such purpose.

It is a significant thing that in all the voluminous testimony of Mrs. Durand she does not suggest that the St. John's Orphan Asylum or the Little Sisters of the Poor were ever mentioned in her hearing by either of the priests or Mrs. McIntyre.

There is no testimony indicating that Mrs. McIntyre, at any time after the death of Mr. McIntyre, intended to make any other provision for her living relatives than those she did make.

The question of undue influence is not a new one in this court. In *Maynard v. Vinton*, 59 Mich. 139 (26 N. W. 401, 60 Am. Rep. 276), Mr. Justice CHAMPLIN, speaking for the court, said:

"To constitute undue influence, some act or acts must have been done to cause the testatrix to dispose of her property contrary to her desire. If it was given according to her free and intelligent desire at the time of making and executing the will, although this desire was prompted by her mother or Miles [who were beneficiaries under the will], it would be a valid disposition of her property. The influence, to vitiate the will, must have been such as to amount to force and coercion, destroying her free agency, and there must be proof that the will was obtained by this coercion. * * * Neither can it be set aside on the ground of undue influence, unless such influence amounted to a degree of constraint, such as the testatrix was too weak to resist, and such as deprived her of her free agency, and prevented her from doing as she pleased with her property. Neither advice nor arguments nor persuasion will vitiate a will made freely from conviction, though such will might not have been made but for such advice or persuasion."

The language of Chief Justice BROOKE, in *Re Williams' Estate*, 185 Mich. 97 (151 N. W. 731), is pertinent here:

"We do not lose sight of the fact that undue influence need not be proven by direct evidence, but can be established by indirect and circumstantial evidence. This principle has been laid down in many Michigan cases, the last two of which are *In re Loree's Estate*, 158 Mich. 372 (122 N. W. 623), and *In re Du Bois' Estate*, 164 Mich. 8 (128 N. W. 1092). But we are of opinion that the contestant must introduce evidence from which inferences may fairly be drawn that such influence was exercised. * * *

"To vitiate a will there must be more than influence. It must be undue influence. To be classed as "undue," influence must place the testator in the attitude of saying, "It is not my will, but I must do it." He must act under such coercion, compulsion, or constraint that his own free agency is destroyed. The will or the provision assailed does not truly proceed from him. He becomes the tutored instrument of a dominating mind, which dictates to him what he shall do, compels him to adopt its will instead of exercising his own, and, by overcoming his power of resistance, impels him to do what he would not have done had he been free from its control. * * * Influences to induce testamentary disposition may be specific and direct without becoming undue. It is not improper to advise, to persuade, to solicit, to importune, to entreat, and to implore. Hopes and fears and even prejudices may be moved. Appeals may be made to vanity and to pride; to the sense of justice and to the obligations of duty; to ties of friendship, of affection, and of kindred; to the sentiment of gratitude; to pity for distress and destitution. It is not enough that the testator's convictions be brought into harmony with that of another by such means. His views may be radically changed, but so long as he is not overborne and rendered incapable of acting finally upon his own motives, so long as he remains a free agent, his choice of a course is his own choice, and the will is his will, and not that of another.' [*Ginter v. Ginter*, 79 Kan. 721 (101 Pac. 634, 22 L. R. A. [N. S.] 1024)]."

See, also, *Severance v. Severance*, 90 Mich. 417 (52 N. W. 292); *Lamb v. Lippincott*, 115 Mich. 611 (73 N. W. 887); *In re Shanahan's Estate*, 176 Mich. 137 (142 N. W. 573); *In re Foerster's Estate*, 177 Mich. 574 (143 N. W. 616).

The case before us is that of a Catholic lady in the possession of her mental powers, without a living father or mother, brother or sister, child or grandchild. She is in the possession of a comparatively large fortune, the major portion of which came to her and her husband by reason of the will of her bachelor brother, who had made his home with her and her husband for years, and the will of her husband. The will of her brother, through which she got much of this prop-

erty, set apart \$60,000 to establish a worthy charity which was a going concern with many needs during the later years of the lives of Mr. and Mrs. McIntyre. There can be no possible doubt from this record that Mr. and Mrs. McIntyre were both solicitous about these two charities. It was a most natural and reasonable act for Mrs. McIntyre to make provision for them. If we give the fullest credence to the testimony of Mrs. Durand and to all fair inferences to be drawn therefrom, it is not made to appear that any influence by priest or other person caused Mrs. McIntyre to make disposition of her property otherwise than according to her judgment and desire. If we apply the principles of law so often announced by this court relative to undue influence to the instant case, it should have been said as a matter of law that there was not sufficient evidence of undue influence to take the case to the jury. As it is not likely a different case can be made, this conclusion makes it unnecessary to consider the other assignments of error.

The judgment is affirmed as to the niece and nephews and the executor. It is reversed as to the other two bequests, and a new trial is ordered, with costs to appellant.

STONE, C. J., and OSTRANDER, STEERE, BROOKE, and PERSON, JJ., concurred with MOORE, J. KUHN and BIRD, JJ., concurred in result reached.

*In re O'LEARY'S ESTATE.*PALMER *v.* UTICA STATE HOSPITAL.

EXECUTORS AND ADMINISTRATORS—ACCOUNT—COMPENSATION—ESTATES OF DECEDENTS—CONCLUSIVENESS OF ALLOWANCE OF ANNUAL ACCOUNT.

Where the administrator, an attorney, expended a large part of the estate for attorney's fees that he paid to the firm of which he was a member, and in an annual accounting the court passed on and allowed the disbursements and certain fees, the allowance of such annual account was not so conclusive upon the parties in interest that it could not be noticed and taken into consideration in determining the administrator's claim for extraordinary compensation included in his final report, though no appeal was taken from the prior order and although the same would not be disturbed by the court, in the absence of fraud.

Error to Wayne; Hally, J. Submitted April 17, 1916. (Docket No. 53.) Decided September 27, 1916. Rehearing denied December 22, 1916.

George P. Palmer appealed from an order of the probate court on his second annual account as administrator with the will annexed of the estate of Michael O'Leary, deceased. The account was opposed by the Utica State Hospital, a creditor. There was judgment disallowing the account in part, and the administrator brings error. Affirmed.

William E. Henze, for appellant.

Sloman & Sloman (*Adolph Sloman*, of counsel), for appellee.

MOORE, J. In this case the administrator filed a second administrator's account containing among others the following items:

"Palmer & Palmer, for services before commissioners on claims as revived, being an amount equal to the sum awarded to each of the commissioners	\$250.00
October 12, 1912. To Geo. P. Palmer, for services as special agent of the probate court in presenting will of deceased before notary public at Hudson, Mich., said services being performed on March 4 and 5, 1909, and prior to the appointment of an administrator w. w. a.....	100.00
Palmer & Palmer, attorneys, for legal services as per their bill hereto attached.....	360.00"

The case was heard before the judge without a jury. He made findings of fact and law, some of which we quote:

"Deceased died in Detroit, in the county of Wayne. Prior thereto he had been a resident at or near Hudson, Mich., for several years. Administration of his estate was first granted to I. P. Norton. He reported \$1,000 in cash in the estate and spent all of it except \$49.54, and part of it was used in an attempt to locate the widow of deceased, who was reported confined 'in an insane asylum in some city in the East.' Afterward a will was found. Said will had been executed at Hudson, Mich., and it became necessary to take testimony of the witnesses at that place to prove the will.

"That George P. Palmer was appointed messenger by the probate court for the county of Wayne for the purpose of taking the will to Hudson, Mich., and obtaining the depositions of the subscribing witnesses to its execution.

"On the will being admitted to probate in the county of Wayne George P. Palmer was made administrator with the will annexed.

"The estate of the deceased, besides the cash which came to the first administrator, consisted of a house and lot at Bryan, Ohio, a farm at Hudson, Mich., and

a loan to Barber and others of \$4,280.95, evidenced by a promissory note and secured by stock of the Telephone Company of Mobile, Ala.

"On October 3, 1910, George P. Palmer filed his first account. The receipts, amounting to \$2,602.05, were made of items consisting of rents, proceeds from sale of machinery, balance from first administrator, and proceeds from sale of farm at Hudson. The expenditures amounted to \$1,112.12 of which \$600 was for attorney fees to Palmer & Palmer. George P. Palmer is a member of this legal firm. His account showed a balance of \$1,489.93, and was allowed a balance of \$1,590.83; the attorney fee evidently being reduced to \$500. * * *

"It appears from the testimony that considerable of the time and services charged by said administrator were expended in opposing the widow's petition for an allowance beyond the first year.

"That said administrator performed no extraordinary services for said estate since the filing of said first report, for which he is entitled to compensation beyond that allowed by section 9438, Compiled Laws (3 Comp. Laws 1915, § 14117). * * *

"That said administrator is entitled to a commission of \$100.17 under the statute for services since the filing of his last report.

"That there is due said estate from said administrator at the date hereof the sum of \$941.77, with interest from November 27, 1912, at the rate of 5 per cent. per annum.

"Findings of Law.

"* * * There is no absolute rule as to the compensation to be allowed an administrator for attorney fees. It is a question for the court under the circumstances of each case.

"An administrator occupies a trust relation not only as to the heirs, but also toward the widow and creditors, and must exercise fairness and good faith in the discharge of his duties, and must conserve the interests of all concerned therein.

"It is not the policy of the law to permit an administrator to conduct the affairs of an estate in a manner that would lead to its being eaten up in charges for himself and the legal services of the firm of which he is a member.

"An administrator for his services to an estate is entitled only to the compensation allowed by statute, unless his services are extraordinary, when he shall be entitled to such additional compensation as the probate court shall deem proper. * * *

"While the statute fixes a time for taking an appeal and review of an administrator's account, and while said account will not ordinarily be disturbed after the lapse of this time, there is nothing in the law which forbids a court in passing upon a subsequent account from taking notice of items contained in the previous account and considering the sum expended for any purpose."

Judgment was rendered in harmony with the findings of the judge. The case is brought here by writ of error.

We quote from the brief:

"The court took into consideration the first account filed by the administrator and allowed by the probate court, from which allowance no appeal had been taken. That is not permissible under the decision of this court in the absence of fraud; *i. e.*, to say fraud in the allowance of the first account and no such fraud has been shown. See *Morton v. Johnston*, 124 Mich. 561 (83 N. W. 369); *Nowland v. Rice's Estate*, 138 Mich. 148 (101 N. W. 214); *In re Ward's Estate*, 152 Mich. 240 (116 N. W. 23); *In re Corby's Estate*, 154 Mich. 355 (117 N. W. 906)."

And it is argued that, as the administrator testified to the rendition of the services and their value, there was nothing for the court to do except to allow the account. A reference to the cases cited will show they are not controlling as claimed.

The record shows a strange attitude on the part of the administrator. Instead of collecting and conserving the estate for the benefit of the widow, if there should be one, and such heirs at law as might appear, the firm of which he is a member have been acting from the beginning for some of the heirs at law, and the administrator has seemed to think it was part

of his duty to defend against the claim of the widow or her representatives for such allowances as the statute gave her.

The record shows that this little estate, to say the least, has been very unfortunately managed. Without going into details, an examination of it shows the court was quite right in saying the administrator had performed no extraordinary services for said estate since the filing of his first account which entitled him to more than the statutory fees.

The judgment is affirmed, with costs to appellee.

STONE, C. J., and KUHN, OSTRANDER, BIRD, STEERE, BROOKE, and PERSON, JJ., concurred.

MISSAUKEE FARM & INVESTMENT CO. *v.* FERRIS.

PARTNERSHIPS—BANKS—NAME—CERTIFICATE OF MEMBERSHIP.

Where a banking partnership was organized under the name of the Missaukee County Bank, under the provisions of Act No. 160, Pub. Acts 1859, and the defendants, who executed their note and mortgage to the bank, knew with whom they were, in fact, dealing, and were not misled by want of knowledge of the persons who constituted the firm, the failure of the partners to file a certificate of membership under Act No. 101, Pub. Acts 1907, or to show such changes in the membership of the firm as occurred after its original articles were filed, showing the names of the copartners, was no defense to the foreclosure of a regularly executed mortgage in equity; substantial compliance with the law of organization of the firm, by filing articles of partnership that contained the names of the then members of the bank, sufficiently authorized them to continue in business, and there was no ground in equity to defeat the mortgage.

Appeal from Missaukee; Lamb, J. Submitted April 11, 1916. (Docket No. 71.) Decided September 27, 1916.

Bill by the Missaukee Farm & Investment Company against Elbert C. Ferris and another for the foreclosure of a mortgage. Defendants filed an answer in the nature of a cross-bill to have said mortgage declared void. From the decree rendered, defendants appeal. Affirmed.

Gaffney, Miltner & Millington, for complainant.

Broomfield & Worcester, for defendants.

MOORE, J. This case was commenced in December, 1914. The trial judge stated the questions involved so clearly in a written opinion that we quote from it:

"The bill of complaint is filed to foreclose a certain real estate mortgage given by defendants Elbert C. Ferris and Marjorie Ferris, his wife, to Missaukee County Bank, to secure the repayment of the sum of \$1,500, represented by a promissory note of even date for the sum of \$1,500 and any renewal thereof, which said mortgage is dated on the 26th day of November, 1909, and covers," etc.

"Defendants Elbert C. Ferris and Marjorie Ferris by answer deny the essential allegations of the complainant's bill, and claim as a matter of law that neither the mortgage nor the note mentioned in the bill is now, or ever was, a valid and subsisting obligation against them, for the reason that the said Missaukee County Bank, the mortgagee in the said mortgage and payee in the note secured thereby, was, at the time the mortgage and note were given, doing business under an assumed name, and had not filed, or caused to be filed, with the county clerk of Missaukee county the certificate required by sections 5271 to 5276, inclusive, of the Compiled Laws (2 Comp. Laws 1915, §§ 6715-6721), or the certificate required by Act No. 101 of the public Acts of 1907 (2 Comp. Laws 1915,

§§ 6349-6353), * * * and for the same reasons deny the validity of the assignment.

"By way of cross-bill defendants Elbert C. Ferris and Marjorie Ferris claim affirmative relief upon the following grounds: (a) That the note is void and illegal for the reason that the Missaukee County Bank was a copartnership doing business under an assumed and fictitious name and had not, up to June, 1913, or at any other time, filed, or caused to be filed, with the county clerk of Missaukee county the certificate required by Act No. 101 of the Public Acts of 1907, or by sections 5271 to 5276, inclusive, of the Compiled Laws of 1897; (b) that the said mortgage is void and illegal for the reasons set forth in item (a); * * * (d) that the note and mortgage are usurious. * * *

"The Missaukee County Bank was organized as a copartnership in 1886, under Act No. 160 of the Laws of 1859 (2 Comp. Laws 1915, §§ 6715-6721), and has continued to do business with some changes in membership up to and since February 16, 1914, with its place of business at Lake City, Missaukee county, Mich. On the 22d day of June, 1902, articles of association with affidavit attached were filed with the county clerk of Missaukee county, showing that on the 14th day of June, 1902, Thomas Kelly, James Cavanaugh, Francis O. Gaffney, and Miles E. Stitt associated themselves together as copartners for the transaction of a general brokerage, exchange, and banking business under and by virtue of the provisions of sections 5271 to 5276 of the Compiled Laws of 1897. These articles, among other things, show the name of the copartnership, place of business, full name and residence of each and every member, the terms of the copartnership, the length of time it is to continue. So far as the record shows this certificate was the only attempt to comply with the provisions of sections 5271 to 5276 of the Compiled Laws up to November 26, 1909, and from thence to December 26, 1911. *

"Some time between 1902 and 1906 Miles E. Stitt died. No new certificate was filed, but the business was conducted as before. In 1906 James Cavanaugh transferred his interest to Francis O. Gaffney and Thomas Kelly, but no new certificate was filed; the

business was conducted as before. On November 26, 1909, when the instruments in question were executed, the Missaukee County Bank was run and owned by Francis O. Gaffney and Thomas Kelly, and they were continuing the business under and by virtue of the articles and certificate filed in 1902. On December 26, 1911, new articles of copartnership were filed with the county clerk of Missaukee county, showing that said copartnership, doing business as Missaukee County Bank, was then composed of Thomas Kelly, Francis O. Gaffney, Henry Miltner, and Christopher C. Lerg. * * * These articles show the name and address of each and every member of the copartnership, the name of the firm, the place of business, the character of the business, the term of its existence as five years, and may be continued for a longer time by mutual consent of all the parties interested. All four copartners signed the articles December 31, 1910. No other articles or certificates were filed until February, 1913, when John F. Doudna was taken in as a member of the copartnership. New articles of copartnership were then filed. They were signed by all members of the copartnership and sworn to by all the members thereof, on the 31st day of January, 1913. These articles show the character of the business, name of the firm, names and addresses of the members, place of business, time of its duration, and that the firm succeeds to the business formerly conducted by the old copartnership of Missaukee County Bank, and that the new firm assumes the old liabilities.

"From the time of its organization to the present time the Missaukee County Bank has done, and still is doing, a general exchange, brokerage, and banking business, with its principal place of business, Lake City, Missaukee county, Mich. For some time prior to the 26th day of November, 1909, defendant Elbert C. Ferris had been dealing with the Missaukee County Bank, and on that date was owing said bank three notes, in the aggregate, interest and all, the sum of \$1,128.75, also was owing for an indorsement on another note the sum of \$9.56, a check on a Cadillac bank for the sum of \$55.50, and also a personal account due F. O. Gaffney of \$106.10. The note and mortgage in question were given by defendant Ferris

and wife to settle for the foregoing indebtedness. So far as the proofs show, no part of such indebtedness was in any way tainted with usury.

"On the 26th day of November, 1909, the defendant Elbert C. Ferris executed and delivered to the Missaukee County Bank a promissory note for \$1,500, due 60 days after date, with 7 per cent. interest after maturity. To secure this note the defendants Elbert C. Ferris and Marjorie Ferris executed and delivered to the Missaukee County Bank, on the 26th day of November, 1909, a real estate mortgage, in which the mortgagee was stated and designated as Thomas Kelly and Francis O. Gaffney, copartners, doing business as Missaukee County Bank, at Lake City, Mich. The payee in the said note is the Missaukee County Bank. The mortgage covers the lands mentioned in the bill of complaint, and the condition is the 'repayment of the sum of fifteen hundred dollars with interest at the rate of seven per cent. per annum, payable annually, said principal to be repaid February 7th, 1910, after date hereof, in accordance with one certain promissory note of even date herewith and collateral hereto. This mortgage being given to secure said note or any renewal thereof until the same is paid in full.'

"At the time the aforesaid note and mortgage were executed and delivered the bank took out \$25 as discount, and gave defendant Elbert C. Ferris credit for \$1,475. With that amount he paid up his indebtedness aforesaid, and had a credit of \$175.59. This note has never been paid, but was renewed from time to time, at intervals of 30, 60, or 90 days as the case might be, up to August 29, 1913, when the last renewal note, the one in question here, became due and payable. The defendant neither paid nor renewed said note at that time, nor has he paid the same, or any part thereof, since, or offered to. At every interval when the note was renewed the Missaukee County Bank was either paid in cash, or by another note discounted at the rate of 10 per cent. for the time the renewal note was to run. No interest as per the terms of the mortgage has been charged or collected. Whatever has been paid for the use of said money has been by the way of what the complainant terms 'discount' on the original note and all subsequent renewals. From the

testimony in the case I find the amount of such so-called discount paid by the defendant or reserved by the Missaukee County Bank from November 26, 1909, to August 29, 1913, to be \$572.08. Since August 29, 1913, nothing has been paid either on principal or on interest, nor has any part of said principal sum been tendered by defendant to this complainant or to the Missaukee County Bank.

"The complainant herein is a corporation, organized on or about the 16th day of February, 1914, under and by virtue of Act No. 232 of the Public Acts of 1903 (2 Comp. Laws 1915, § 9017 *et seq.*), with Francis O. Gaffney, Thomas Kelly, Henry Miltner, John F. Doudna, and Christopher C. Lerg as the stockholders and incorporators. The principal place of business of complainant is now, and ever has been, Lake City, Mich. On the 16th day of February, 1914, the aforesaid mortgage and note were assigned to this complainant for a consideration of \$1,700 by Francis O. Gaffney, Thomas Kelly, Henry Miltner, John F. Doudna, and Christopher C. Lerg, copartners as Missaukee County Bank, by Christopher C. Lerg, attorney in fact. Said complainant still holds said note and mortgage, and the same is due and unpaid. At the time of said assignment the said note was several months past due. * * *

"1. It is claimed by the defendants that at the time the mortgage and note in question were executed the Missaukee County Bank was without legal capacity to contract for two reasons: (a) That it had not complied with the provisions of Act No. 160 of the Laws of 1859; (b) that it had not filed the certificate required by Act No. 101 of the Public Acts of 1907.

"Upon careful consideration of the provisions of Act No. 160 of the Laws of 1859 and the purpose for which it was passed, and having in mind the articles of copartnership and affidavit attached thereto, filed June 22, 1902, I am satisfied that there was, at that time, a substantial compliance with the law, and that the Missaukee County Bank, so far as that branch of the question is concerned, was authorized to enter upon the business for which it was organized.

"Assuming, then, that the Missaukee County Bank had authority to do business by virtue of the papers

filed in 1902, did it lose that authority by reason of the fact that no other certificate or articles of copartnership were filed either after the death of Miles E. Stitt or after the transfer of the stock of James Cavanaugh in 1906?

"Section 5272 of the Compiled Laws of 1897, being section 2 of Act No. 160 of the Laws of 1859, provides as follows:

"In case there shall be, at any time after (the) making and filing of said certificate, any change in the name or style of said firm, or in the terms of their partnership, then a new certificate verified as before specified, shall in like manner be filed, as required by section one of this act, before such change shall take effect; and until such new certificate shall have been made and filed, as above specified, the individual member or members of the firm, as set forth in the certificate on file, shall be held to be the actual members of the firm, and in all respects holden and liable for any obligation, debt or liability, incurred by the said company, as brokers or exchange dealers.'

"In absence of any authority to the contrary I do not believe it was the intention of the legislature, in passing Act No. 160 of the Laws of 1859, to have, or intend the failure on the part of any copartnership, organized thereunder, to file a new certificate in case of the death of one of the copartners, or in case of the sale of stock by one of the copartners to the remaining copartners, *ipso facto*, work or operate as a dissolution of the copartnership, the articles of copartnership being themselves silent upon that subject. * * *

"Defendant Elbert C. Ferris had on numerous occasions recognized the capacity of the Missaukee County Bank to contract by actually entering into contracts with it, voluntarily and without question. On November 26, 1909, he entered into the written contracts in question with said Missaukee County Bank, which said contract the bank has fulfilled on its part, and which the defendant has not wholly, at least, fulfilled, or offered to fulfill. Under such a state of facts, if the Missaukee County Bank were a corporation, and the defendant had dealt with it as such, without question or objection he would be held to be estopped from raising that question, and I can see no valid reason

why the defendant should not be so estopped in this case in so far as the completeness of its compliance with the provisions of said Act No. 160 is concerned.

"It is also claimed by defendant Elbert C. Ferris that it was necessary for the Missaukee County Bank to file a certificate in accordance with Act No. 101 of the Public Acts of 1907, and, not having done so, it was therefore incapacitated from entering into the contract in question. The complainant claims that the bank, having been organized under and by virtue of the terms of a general law, and having substantially complied with its provisions, comes within the exception provided for in section 4 of Act No. 101 of the Public Acts of 1907, which reads as follows:

"This act shall in no way affect or apply to any corporation, partnership association, limited or special partnership duly organized under the laws of the State, or to any corporation organized under the laws of any other State and lawfully doing business in this State."

"The language of this section of the statute is general in its scope, and, in my judgment, includes a co-partnership organized under Act No. 160 of the Laws of 1859. I conclude, therefore, that it was unnecessary for the Missaukee County Bank to comply with Act No. 101 of the Public Acts of 1907. * * *

"2. It is the contention of the defendants that, at the time of the assignment of the mortgage and note by the Missaukee County Bank to the complainant, said bank had no legal capacity to make the contract for the reasons discussed under the preceding head.
* * *

"From a careful consideration of the papers filed with the county clerk of Missaukee relative to the re-organization of the Missaukee County Bank, in February, 1913, I am satisfied that there was a substantial compliance with the provisions of Act No. 160 of the Laws of 1859. For the reasons before given I am inclined to hold that it was unnecessary for the said Missaukee County Bank to comply with the provisions of Act No. 101 of the Public Acts of 1907."

The court found the contract was usurious, and concludes the opinion as follows:

"Having considered the case from all angles and in all its phases, I am impressed with the conclusion that the complainant should recover in the sum of \$927.92, being the balance after deducting the usurious interest payments of \$572.08 from the principal sum of \$1,500."

A decree was entered accordingly. The complainant did not appeal. The defendants appealed.

Stated tersely, the claim is that the note and mortgage and the assignments thereof are void for the reason that the bank had not complied with Act No. 160 of the Laws of 1859; also that said Missaukee County Bank, on November 26, 1909, was doing business under an assumed and fictitious name, and had not complied with Act No. 101 of the Public Acts of 1907, citing *Cashin v. Pliter*, 168 Mich. 386 (134 N. W. 482, Am. & Eng. Ann. Cas. 1913C, 697), and other cases found in the brief. In disposing of the case it must be remembered that an attempt was made by the bank when this partnership was formed to comply with the statute. The mortgage ran to Thomas Kelly and Francis O. Gaffney, copartners doing business, etc. They were two members of the original copartnership. The mortgage was given to secure the payment of a note "or any renewal thereof." The renewal note, which is unpaid, read:

"I promise to pay to the order of Missaukee County Bank \$1,500.00, at the Missaukee County Bank, Lake City, Michigan, of Gaffney, Kelly, Miltner & Lerg."

So it is clear defendants knew when they made the mortgage, as well as when they made the notes, with whom they were dealing.

There are later cases than *Cashin v. Pliter*, *supra*, involving a construction of Act No. 101 of the Public Acts of 1907. Some of them are *Axe v. Tolbert*, 179 Mich. 556 (146 N. W. 418); *Sauer v. Construction*

Co., 179 Mich. 624 (146 N. W. 422); *Cross v. Leonard*, 181 Mich. 24 (147 N. W. 540); *Zemon v. Trim*, 181 Mich. 130 (147 N. W. 540). In *Sauer v. Construction Co.*, *supra*, Justice STEERE, speaking for the court, said the manifest object of Act No. 101 is to protect the public against imposition and fraud. In the instant case the defendants were not deceived; they knew with whom they were dealing. In our opinion, the provisions of Act No. 101, Pub. Acts 1907, do not apply.

This is a proceeding in equity. The defendants seek affirmative relief through the agency of a cross-bill, in which it is averred:

"For as much, therefore, as these defendants and cross-complainants are without remedy in the premises, except in a court of equity, they therefore respectfully pray: (1) That the note mentioned and described in the first paragraph of said bill of complaint may be decreed to be null and void and of no effect," etc.

The defendants had the use of the complainant's money, and under the decree as made they get the use of it without the payment of any interest. By invoking the provision of the statute they now seek to avoid paying any of the money which they got from the complainant. We are not inclined to aid them in accomplishing such a palpable wrong.

The decree is affirmed, with costs.

STONE, C. J., and KUHN, OSTRANDER, BIRD, STEERE, BROOKE, and PERSON, JJ., concurred.

AUSTIN v. CROWELL.**1. EJECTMENT—TENANTS AS PARTIES.**

In an action of ejectment affecting a parcel of land, part of which was located in the rear or back yards of certain tenant houses, rented and occupied by lessees of defendant, who claimed no interest in the property except as tenants of the defendant, the persons in occupancy were not necessary parties.

2. SAME—ADVERSE POSSESSION—PARTIES—LANDLORD AND TENANT.

A defendant in ejectment cannot, for the purpose of defeating the action, rely upon the nonjoinder as defendant of any person occupying the premises with him under a claim of right subordinate to, or inseparable from, his own possession.

3. ADVERSE POSSESSION—FENCE—BOUNDARY LINES.

Adverse possession of a strip of ground lying adjacent to plaintiff's lot was not established by testimony showing the construction of a crooked fence, claimed to be nearly on the line, and that disappeared in less than the fifteen-year period.

4. SAME—APPEAL AND ERROR—INSTRUCTIONS.

Where the trial judge instructed the jury, in a somewhat lengthy charge, that the defense of adverse possession had not been sufficiently proved, and did not leave the question to them, but thereafter again discussed the question, while the instruction may have been somewhat misleading, the court could not say the charge was so erroneous as to require a reversal of a judgment for plaintiff.

Error to Kalamazoo; Stewart, J. Submitted April 10, 1916. (Docket No. 55.) Decided September 27, 1916.

Ejectment by Minnie Austin against Mary J. Crowell. Judgment for plaintiff. Defendant brings error. Affirmed.

Harry C. Howard, for appellant.

Alfred S. Frost, for appellee.

MOORE, J. This is ejectment brought by the plaintiff to recover possession of a strip of land eight feet in width on a city lot located near the northeast corner of Grant street and Asylum avenue (now Oakland drive), in the city of Kalamazoo. Grant street runs east and west. Oakland drive runs nearly north and south. The defendant owned three tenement houses facing on Oakland drive. She did not live in any of them. They were occupied by tenants.

In 1890 the land on Grant street was surveyed by Mr. Balch, and a plat made showing six lots fronting on Grant street. The parties to this suit trace title to the person who had this survey made. When he sold the land, instead of selling it as lots shown by the plat, his deeds described the lands by metes and bounds, and the record seems to indicate that he conveyed two feet of land fronting on Grant street more than there was. The plaintiff owned one of the lots fronting on Grant street. The defendant at the time this suit was brought was the owner of the northerly portion of the lot which was bounded on the west by Asylum avenue (now Oakland drive) and on the south by Grant street. Her lots fronted on Oakland drive and ran back so that the rear of them abutted against the west side lines of the rear portion of the plaintiff's lot.

In 1904, shortly after plaintiff obtained title to her lot, she caused a survey to be made of the lots conveyed by the common grantor. This survey showed that the lines were not where, up to that time, it was supposed they were located. The record indicates that all the parties affected by the survey except the defendant accepted it. It is the claim of plaintiff that until shortly before this suit was brought no one

disputed the accuracy of the survey. Two surveys by other surveyors were subsequently made which agreed substantially with the survey of 1904.

July 4, 1911, plaintiff built a fence on the line between the rear of her lot and the rear of the lots of the defendant as shown by the survey of 1904, which line she claims is the true line. July 12, 1911, the defendant, assisted by her daughter removed this fence, claiming it had been placed on her land. The land involved is eight feet one way and about eighty feet the other way. This suit in ejectment was brought August 22, 1911. On September 7, 1911, the defendant pleaded the general issue. The case was tried before a jury. From a verdict and judgment in favor of the plaintiff the case is brought here by writ of error. Reversal of this judgment is sought for four reasons:

(1) The actual occupants of the premises described in the plaintiff's declaration were not made parties defendant.

(2) Because the boundary lines included within the lines occupied by the defendant and her tenants were boundary lines established by long practical acquiescence of plaintiff's predecessors in title.

(3) Because the defendant and her tenants had occupied the property without dispute from 1890 to 1911, and had acquired title thereto by adverse possession.

(4) The court's charge.

We will consider these reasons in the above order.

1. The defendant had three houses on her lots, each of which was occupied by a tenant each of whom used the yard back of the house. Immediately and for some years previous to the erection of the fence by the plaintiff there was no fence between. Counsel for defendant insist that each of the tenants should have been made a party defendant, citing sections 13150, 13159, 5 How. Stat. (2d Ed.), 3 Comp. Laws 1915,

§§ 13171, 13180, and *Lockwood v. Drake*, 1 Mich. 14; *Crane v. Seitz*, 30 Mich. 453; *Hoyt v. Southard*, 58 Mich. 432 (25 N. W. 385); *Haddy v. Tobias*, 85 Mich. 326 (48 N. W. 499); *Farrand v. Kavanaugh*, 132 Mich. 436 (93 N. W. 1083). A reference to this statute and the cases cited will show they are not controlling. In the instant case the defendant pleaded the general issue. She testified that no one but herself had an interest in the disputed strip. None of the tenants were claiming any interest except what came to them as tenants of defendant. No one of them is complaining that he or she was not made a party. This ejectment proceeding does not affect the occupants of defendant's houses or of the yard that properly goes with them.

In *Bunce v. Bidwell*, 43 Mich. 542 (5 N. W. 1023), Justice COOLEY speaking for the court, it was held the wife was not a necessary party where the land in dispute was a strip of land adjoining the 40 acres where they lived. In *Hendricks v. Rasson*, 49 Mich. 83 (13 N. W. 367), it was held the defendant in ejectment cannot for the purpose of defeating the action rely upon the nonjoinder as defendant of any person occupying the premises with him under a claim of right that is subordinate to and inseparable from his own possession. See, also, *Arnold v. Brechtel*, 174 Mich. 147 (140 N. W. 610). Upon this record the case should not fail because the tenants were not made defendants.

2. We now come to the question of the boundary lines which it is claimed were established by acquiescence. The judge gave the following request:

"In an ejectment suit the plaintiff must rely upon the sufficiency of her own title, and cannot question defendant's title before making a *prima facie* case of actionable right in herself, and the plaintiff must recover on the strength of her own title where the de-

defendant is in possession, and in applying this law you are to consider and determine from the evidence in the case whether or not the plaintiff has established her right to recover, and to that end you should consider not only the evidence offered by the plaintiff, but the evidence offered by the defendant as well. If you should find that the only question in dispute was where the west line of the Brown land was located, then you should determine from all the evidence in the case where that line actually is, and if you find as contended for by defendant, then your verdict should be in favor of the defendant, no cause of action."

In his general charge he stated:

"If you should find that this land had been surveyed by Balch and Mershon in 1890, and that thereafter Mershon had sold for the E. B. Crowell lots along Grant street and pointed out to the purchasers the location of the premises, and the purchasers went into possession thereof upon the agreed and established boundaries as pointed out by Mershon, and they and their grantees so continued to occupy said lots up to the time that the plaintiff acquired title to her property on Austin street, and that she caused a new survey to be made according to the descriptions contained in the deeds, and induced people owning lands upon Grant street to change their old lines of occupation as established by them and Mr. Mershon, I charge you that in law it was not possible for the plaintiff to make the lot owners on Grant street or this defendant give up the established and agreed marks and accept another, even though you should find that the several surveys made under the direction of Mrs. Austin were in exact accord with the descriptions contained in the deeds of the respective owners, because the law wisely says that, where a line is established by consent, it shall not again be changed except by consent, and the fact that the lot owners on Grant street may have consented to change their lines to meet the terms of Mrs. Austin's survey would not compel this defendant to accept that survey."

It is true the judge said a good deal more upon this

subject, but he put the disputed question squarely before the jury, which decided in favor of the plaintiff.

2 and 3 may be considered together.

Severe criticism is made of the charge, particularly of that part reading:

"(1) I say to you in the beginning, gentlemen of the jury, as a proposition of law, that there is no adverse possession here, steady and undisputed for 15 years. That the court charges you as a matter of law is out of the case. And it must be determined by the deed, and what has taken place since. * * *

"The defendant contends that she and her grantors have been in exclusive, open, and adverse possession of this land for the full period of 15 years prior to the commencement of this suit, and if you find this to be a fact, it would make no difference what the surveys might show, for the reason that under the law, after the lapse of 15 years of adverse possession, peaceable, open, and notorious, the occupant of the land cannot be disturbed, and in figuring the 15 years you figure not only the number of years that the defendant herself has occupied it, but also the number of years that those owning the land prior to her ownership occupied it, and should you find that she had been in possession of it for full 15 years, then your verdict must be in her favor, no cause of action. But you must find that the possession was peaceable, open, notorious, and adverse. As the court before said, the question of adverse possession cannot enter under the testimony in this case before you.

"The fourteenth is given as modified: If you find that the defendant and her grantors had been in peaceable, open, and notorious possession of the land described in the plaintiff's declaration for the period of 15 years before the plaintiff commenced her suit, your verdict should be for the defendant, no cause of action. The court again says that the question of adverse possession cannot enter into this case"

—and similar language.

The charge is very long. It indicates an attempt to cover every phase of the case presented by counsel. The language quoted was not well calculated to be

helpful to the jury. An examination of the record, however, convinces us that defendant did not give testimony of facts which, if believed, constituted adverse possession. It is true that there is testimony that her husband built a fence which she says was on the line to inclose pasture for the horse and cow. The evidence is that the fence was very crooked and disappeared after a time much less than 15 years.

There was testimony about one of the tenants having a garden. It was in dispute as to where it was put. It was maintained but a year or two. There was testimony that in the season of 1911 one of the tenants mowed a portion of the disputed strip which was in lawn, but, giving all this testimony the most favorable construction possible in favor of defendant, it fails to show continued visible and adverse possession for a sufficient length of time to ripen into a title. It would have been well for the court, after he stated the defense of adverse possession was not open to defendant, to have dropped the subject, but we do not think what he said was reversible error.

Judgment is affirmed, with costs.

STONE, C. J., and KUHN, OSTRANDER, BIRD, STEERE, BROOKE, and PERSON, JJ., concurred.

COLLINS v. MICHIGAN CENTRAL RAILROAD CO.

1. CARRIERS—INTERSTATE COMMERCE—ELECTRICITY—MASTER AND SERVANT.

Defendant was an interstate carrier engaged in business between the States. Plaintiff was employed by the railroad company, at repairing lines of telegraph and telephone and was a lineman of experience. At the time he was hurt he was one of a gang which repaired lines and was employed at new construction work. While erecting new wires at the yard in Michigan City, Indiana, to connect with another route or line, he received a severe shock and was burned by reason of a contact between the telegraph wire of defendant and a trolley wire. *Held*, that plaintiff was employed in interstate service and was included within the provisions of the employers' liability act, 35 U. S. Stat. 65, and that there was evidence in plaintiff's behalf which presented a question for the jury.

2. SAME—NEGLIGENCE—EVIDENCE.

And though plaintiff's fellow servant denied that he allowed the wire to slacken and strike the power wire, the question remained one of fact, under evidence tending to show the slackening of the wire.

3. SAME—APPORTIONING NEGLIGENCE—DAMAGES.

Instructions of the court to the jury, in substance, that plaintiff was entitled to such sum as would make him good, reducing the amount found due in proportion to the degree of neglect of which he might be found guilty, correctly stated the measure of damages and the rule of apportionment.

Error to Arenac; Sharpe, J. Submitted June 16, 1916. (Docket No. 50.) Decided September 27, 1916.

Case by Irvin Q. Collins, an infant, by his next friend, against the Michigan Central Railroad Company for personal injuries. Judgment for plaintiff. Defendant brings error. Affirmed.

Cooley & Hewitt (Humphrey, Grant & Humphrey, of counsel), for appellant.

S. E. Hayes & Son (Coumans & Gaffney, of counsel), for appellee.

MOORE, J. This is a suit to recover damages for a personal injury sustained by the plaintiff while working as a lineman in Michigan City, Ind. The accident occurred June 3, 1914. Suit was brought under the Federal employers' liability act of 1908. The result was a verdict of \$6,000 in favor of the plaintiff. A motion was made for a new trial, in denying which the circuit judge filed an elaborate statement of his reasons for doing so. The case is brought here by writ of error.

There are 37 assignments of error which are grouped and discussed by counsel as follows:

(1) Is this case properly maintainable under the Federal act?

(2) Absence of proof of defendant's negligence and speculation and conjecture.

(3) Plaintiff's assumption of the risk.

(4) Plaintiff's contributory negligence.

(5) Improper measure of damages.

The first, and one of the most vital questions in the case, is the allowing a recovery under the Federal employers' liability act of 1908. It was conceded by counsel on both sides that the applicability of the statute was a question of law, and the court charged the jury:

"It is conceded by counsel that it is a question of law, under the evidence submitted here, for me to determine whether or not the plaintiff was, at the time of his injuries, engaged in what is spoken of under this Federal law as 'interstate commerce.' * * * I say to you as a matter of law that the plaintiff at that time was engaged in interstate commerce, and that consequently the Federal statute is the one under which his rights are based."

It was and is conceded that the Michigan Central

is an interstate carrier engaged in an interstate business, but it is stoutly denied that plaintiff was engaged in interstate commerce when he was hurt. This claim makes it necessary to refer briefly to the facts. Plaintiff was about 18 years of age, of average intelligence. His home was at Sterling, Mich. When hurt, he had been at work for defendant about a year, and was regarded as an expert lineman. He was one of a gang of seven to ten men engaged in repairing the telegraph and telephone lines of defendant. During the year of Mr. Collins' employment he had worked in various cities along the line of the Michigan Central in three States, and had done various kinds of work, and on various wires and branches of the telephone and telegraph service which is maintained throughout the system.

At the time of the accident the Michigan Central Railroad Company maintained along its right of way over each of its divisions a telegraph, a telephone, and a signal system, maintaining for that purpose, on poles of the Western Union, along the right of way, two through telephone wires for the dispatcher's use, two through telephone wires for the message phone, and two signal wires. Within the yard and city limits of Michigan City, State of Indiana, for 20 years prior to the time of the accident, the Michigan Central Railroad Company also maintained an intercommunicating system, which was known as a yard telephone service. Starting at the depot, these wires ran first to the east end of the yard, to the yardmaster's office, where the first phone was maintained; then to the assistant yardmaster's office, where the second phone was maintained; then to the car repairer's shop, where the third phone was maintained; thence to the switch tender's shanty at the east end of the yard, where the fourth phone was maintained; thence to the interlocker on the

bridge where the fifth phone was maintained; thence to the old yard, where the sixth phone was maintained; thence to the roundhouse, where the seventh phone was maintained; and back to the depot, where the eighth and last phone was located. Prior to the time of the accident this entire system extended from the depot into the yard to the east of the depot. For three or four months prior to the time of the accident the plaintiff, together with the other members of his gang, had been engaged in work in the city of Michigan City, on this yard telephone system, but they had completed this work, and in the morning of the day of the accident they commenced to string two new wires from the first pole west of the depot to a box car used as an office at the transfer point between the defendant and the Monon Route 8,000 feet west of the depot.

The usual method of stringing two wires was to use a bridle, which consisted of a round stick from 2 to 3 feet long, with a short wire fastened at each end of the stick on the side opposite the loop, an end of each of the wires that were to be strung was fastened, a rope was then fastened in the center of the wire loop, and then by pulling on the rope the two wires were held apart by the stick and drawn along together, a rope being used because it is a nonconductor of electricity. At the first pole the rope would be passed over a cross-arm of the pole, and pulled by one of the men on the ground until the bridle reached the pole. Sometimes the wire was placed over a cross-arm, and sometimes the man who went up the pole would fasten a bracket on each side of the pole and pass the wire over the bracket instead of the cross-arm. On the morning of the accident they started stringing the wire for about half a mile to the west near Tenth street, along which the South Shore Electric Road ran at right angles to the wires. At that

point the wires were made fast to the pole and cut off. The reel was then taken west to the Monon transfer track, and the wires were again taken up a pole and strung in the same manner back to the east; the purpose being to haul half of the wire each way. The accident occurred about 2 o'clock in the afternoon. The wire had been strung back to the east from the Monon transfer, so that they were crossing Tenth street with the wire when the accident happened.

Alexander McEachern, a member of the gang, had gone up the pole on the west side of Tenth street, and the wire had been pulled up to him. The plaintiff took the rope and threw it over the trolley wire, which carried 6,600 volts of electricity, and then took the rope and climbed up the first pole on the east side of the street. The plaintiff, having carried the rope up the pole, dropped it over the cross-arm down to a fellow workman on the ground, who took the rope and pulled the bridle and the wires attached to it from McEachern across the street to the plaintiff. One of the wires in some way came in contact with the trolley wire, and plaintiff was severely burned and rendered unconscious. He remained lodged among the wires strung on the pole until rescued by men from the fire department, after the current had been turned off the trolley wire.

The language of the Federal statute involved here is:

"That every common carrier by railroad while engaged in commerce between any of the several States * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce." 35 U. S. Stat. 65.

It is the claim of defendant—we quote from the brief:

"The particular service at the time of the injury, therefore, being the criterion for applicability of the

act, and as it is well known that the service of many employees alternates between first intra and then inter state commerce indiscriminately, the Supreme Court of the United States was soon required to determine the precise degree of nicety to which the distinction between the two employments in such a case would be drawn."

It is contended that new construction work is never interstate commerce, and that, as the wires at the depot end were not attached to any wires there, and as there had never been a phone at the Monon box office, and as this new wire was being strung to be attached to a phone at the Monon box office, where there had never been one, it was new construction, and therefore intrastate commerce and not interstate commerce, counsel citing *Illinois Cent. R. Co. v. Behrens*, 233 U. S. 473 (34 Sup. Ct. 646, Am. & Eng. Ann. Cas. 1914C, 163); *Mondou v. Railway Co.*, 223 U. S. 1 (32 Sup. Ct. 169, 38 L. R. A. [N. S.] 44); *Van Brimmer v. Railway Co.*, 190 Fed. 394; *Shanks v. Railroad Co.*, 239 U. S. 556 (36 Sup. Ct. 188, L. R. A. 1916C, 797), and other cases to be found in the brief.

It must be conceded that the authorities are not uniform. A reading of the cases cited by counsel will show them distinguishable from the case before us. In *Doherty on Liability of Railroads to Interstate Employees*, p. 89, it is said:

"The act may fairly be interpreted to include all mechanics who are engaged at the time of injury upon instrumentalities which are generally and indiscriminately used for all the purposes of an interstate railroad, as, for instance, linemen, track repairers, and laborers engaged in the general maintenance of the interstate highway or its signal wires or apparatus and those whose duties relate to the construction, maintenance, and repair of those instrumentalities which are used in the business conducted by the interstate railroad without discrimination between the local or interstate character of its traffic. *Snead v. Rail-*

way Co., 151 Fed. 608. These general terms include the vast majority of the employees of an interstate railroad who may be affected by peril of accident; for, as railroads are practically conducted, there are few employees whose duty is so purely local that they have no relation to interstate traffic. This interpretation of the act is sustained in the case of *Johnson v. Railway Co.*, 178 Fed. 643 (102 C. C. A. 89), in the circuit court of appeals for the eighth circuit. District Judge William H. Munger in the majority opinion said:

"It is argued that the employers' liability act can have no application to the case, as plaintiff was not an employee engaged in interstate commerce. A part of his employment was to see the coupling of cars and the air hose upon the cars which were placed upon the transfer tracks. Some of those cars, among them the one in question, were engaged in interstate commerce."

"It is difficult to see why he was not an employee engaged in the movement of interstate commerce to as full an extent as a switchman engaged in the making up of trains in the railroad yards, as in the case of *Chicago Junction R. Co. v. King*, 169 Fed. 372 (94 C. C. A. 652)."

In *Coke & Coal R. Co. v. Deal*, 231 Fed. 604, the following language is used:

"The Supreme Court having declared that one who is injured while carrying spikes to be used in repairing a bridge over which interstate commerce is transported is deemed to be engaged in interstate commerce within the meaning of the act, it necessarily follows that, as in this instance, where one is injured while attempting to erect a telegraph pole to be used for the purpose of supporting wires over which messages are to be sent in directing the operation of trains in order that a company engaged in interstate commerce may safely operate its trains, such person is engaged in interstate commerce within the meaning of the act. It is strenuously contended that this construction would violate the rule announced by the Supreme Court in declaring the first employers' liability act unconstitutional, and lead to absurdities; in other

words that there would be no place where a line could be properly drawn. The answer to this contention is, we think, that whenever it appears that a party injured is engaged in employment that is necessary to the maintenance of any of the instrumentalities essential to the successful operation of a road by a carrier engaged in interstate commerce, such party is deemed to be engaged in interstate commerce, and in case of injury, while thus engaged, is entitled to any benefits accruing under the Federal employers' liability act."

See other cases cited in the brief of counsel.

In the instant case the plaintiff had been in the employ of defendant road, which has tracks in three States, at a monthly wage for nearly a year. He was nearly all the time stringing or repairing telegraph and telephone wires used for conveying messages necessary to the expeditious and safe movement, not only of local trains, but of trains passing in and out of the State. At the time of his injury he was stringing a wire on poles carrying wires which were used in interstate commerce. The primary purpose of stringing the wires he was handling was to enable the employee at the Monon box office to move cars coming in and going out of the State more safely and expeditiously. We think the plaintiff was engaged in interstate commerce.

2. Was there proof of defendant's negligence? We quote the testimony of plaintiff:

"Q. Mr. Collins, state whether or not there was any place or position that you could get in and do the work you were sent up on that pole to do than where you were.

"A. No; not under the circumstances I was on that pole in.

"Q. Now, the pole that you was on—Mr. Cressen was on the ground, the other side of that pole, was he?

"A. On the east side. There was nothing that Mr. Cressen could do, or he did not do anything that would cause any slack to slack back between the pole that

I was on and the pole that McEachern was on, not that I know of.

"Q. Now, was there anything that you did there that slackened that wire so that it dropped down?

"A. No, sir; there was not.

"Q. And in reaching over, if you say you did reach over, to reach one of the wires, state whether or not in any manner that was displaced, or did displace the bridle so as to slacken the wire in any manner from what you fastened it over the pin.

"A. Well, I had fastened it over the pin, and had my hand onto it, holding it right against that other cross-arm, against the pin, so that it could not get back anyway. There was just two people who had control of that wire in any manner there from that end; that was myself and Mr. Cressen, and Mr. Cressen did not in any manner, or could not slacken the wire.

"Q. And you say, also, that you did not, in any manner, permit that wire to slacken, and that it did not slacken from that end?

"A. Yes, sir."

It is true Mr. McEachern testified he did not slacken the wire, but this presented a fair question for the jury.

The next question calling for consideration is, Was there an improper measure of damages submitted to the jury? In answering this question, we can do no better than to quote from the opinion of the trial judge in denying the motion for a new trial:

"Was the verdict excessive? The plaintiff's injuries were surely very serious, and his suffering must necessarily have been intense. His own testimony and that of the members of his family indicate that he still suffers, and is likely to do so. His body is badly scarred, and considerable of the tissues have been destroyed. Very much larger sums have been paid for injuries, in my opinion, much less severe. This would seem to dispose of this particular reason assigned were it not for the fact that counsel, in their brief, insist that the court erroneously instructed the jury as to

the measure of damages in case they found the plaintiff himself to have been negligent as well as defendant. The matter of apportioning the damages in cases of such a finding by the jury was discussed informally between the court and counsel at considerable length, and all were agreed as to the rule to be applied. And in order that this rule as understood by defendant's counsel might be clearly stated to the jury, the court gave an additional request, prepared in pencil, and handed up by counsel, and which was the last word on the question to the jury. It reads:

"Plaintiff is entitled to such sum as will make him good, only provided you find that McEachern was at fault, and he was not himself, in any way, at fault. But if you find that he was himself at fault you must reduce the amount which you believe would make him good in direct proportion to the amount of his fault."

"This, I apprehend, is substantially as before stated in the charge. While not in the language suggested as appropriate in the case of *Norfolk & Western R. Co. v. Earnest*, 229 U. S. 114 (33 Sup. Ct. 656, Am. & Eng. Ann. Cas. 1914C, 172), it would seem that it could lead the jury to adopt no other course in apportioning such damages than is therein stated as the proper one. At all events, the court having instructed the jury on this matter just as requested by defendant, it would seem that it should be estopped from questioning the correctness of the instructions given."

The other questions raised by counsel have been considered. We do not think it necessary to discuss them.

Judgment is affirmed, with costs to appellee.

STONE, C. J., and KUHN, OSTRANDER, BIRD, STEERE, BROOKE, and PERSON, JJ., concurred.

BROWN v. PENDERGAST.

SALES—GUARANTY OR WARRANTY—BREACH.

Where defendant, after the installation of a refrigerating machine guaranteed to have a certain capacity by the seller, gave to the engineer who put it in a statement that it conformed to specifications and was in operation, etc., the release did not bar a recovery for failure to conform to the warranty of capacity.

Error to Wayne; Mandell, J. Submitted June 6, 1916. (Docket No. 3.) Decided September 27, 1916.

Assumpsit by Roy W. Brown against Charles D. Pendergast on a promissory note. Judgment for defendant. Plaintiff brings error. Affirmed.

Douglas, Eaman & Barbour, for appellant.

F. J. Riggs, for appellee.

MOORE, J. This is a suit on a promissory note given by defendant to Wolf, Sayer & Heller, as part payment for a refrigerating machine purchased by defendant of Wolf, Sayer & Heller. Mr. Pendergast was a furrier and desired the machine to refrigerate a room to be used by him for the cold storage of furs. With his plea of the general issue defendant gave notice of failure of consideration in that the machine would not do the work it was guaranteed to do, and also gave notice of recoupment for expenditures incurred and profits lost by reason of the failure of the machine to work properly. At the trial the defendant gave evidence tending to show that the machine would not work properly, and that he had suffered damages for that reason. The plaintiff gave evidence tending

to show that the machine, if properly managed, would do the work.

The plaintiff asked at the conclusion of the evidence for a directed verdict for the amount of the note and interest. The court charged the jury in part as follows:

"The real issue in the case is: Did the firm of Wolf, Sayer & Heller furnish to the defendant the kind of a plant that is specified in the contract that the firm had with Mr. Pendergast? If it did Pendergast must pay this note and interest. If it did not, then Pendergast should be released from such an amount of that note as you find the damage was that he suffered by reason of imperfect or improper machine under the terms of the contract, because that is to be the test. * * *

"The plaintiff claims that after the plant was installed and had been in operation a short time a certain release was given by the defendant to this firm stating that the machine did operate properly and under the terms of the contract that no claim could be made except for defects in workmanship and material. With regard to that I charge and instruct you that that would not relieve the firm from liability in the nature of a set-off because when one purchases something, if the party selling it undertakes or by way of guarantee or assurance represents that it will do the work that is called for in the contract, that, gentlemen of the jury, is sufficient assurance to form the basis of a claim against the party furnishing the goods. I do charge, though, with regard to that paper writing, as follows: 'That any defects or imperfections in the installation of the machine were waived by the acceptance of the machine by the defendant.' That refers to any defects or imperfections with regard to the installation merely. The question whether or not the machine was proper and suitable for the business that was required under the terms of the contract that existed between the plaintiff firm and the defendant remains an open question, and that question must be determined as a disputed question of fact by you.
* * *

"The defendant claims that he has not used this machine because it will not work, and the plaintiff answers that by saying if it was properly operated it would work. These claims are supported in a degree by certain testimony, and from that testimony you will have to determine. The defendant coming in and urging a cross-claim by way of set-off and recoupment has to carry the burden of proof with regard to his claim. He must establish his claim by a fair preponderance of evidence."

The material parts of the contract read:

"C. D. PENDERGAST,
"1090 Third Ave.,
"Detroit, Mich.

"*Gentlemen:*

"We propose to furnish you a refrigerating plant as hereinafter described, according to the following specifications and subject to the following conditions, and for the sum hereinafter named. One compressor of three ton refrigerating capacity, fitted with our improved ammonia valves, stuffing boxes of the ammonia compressor will be packed with special ammonia packing and bearings, fitted with automatic oilers, where practicable. The compressor is to be driven by belt (or direct connected motor if so ordered). * * * We will furnish compartment with brine storage tanks and coils of sufficient capacity to assist in maintaining the temperature in the rooms for a period of twelve hours, when the machine is not running; contents of room to be thoroughly chilled before discontinuing the operation of machine and doors not to be opened during the time the machine is not running. * * * It being understood and agreed that we will furnish an erecting engineer who will take charge of and direct the installation of the plant. The board and traveling expenses of the engineer, necessitated for the completion of the work, to be paid for by us. All other labor necessary to assist the engineer in installing the plant is to be provided and paid for by the purchaser. * * * That upon the completion of the installation our engineer will operate the plant for two days, during which time the necessary power, light, water and other incident-

tals, together with the necessary assistance to our engineer, will be furnished by the purchaser. If at the end of this time the plant meets the requirements of this proposal it shall be accepted by the purchaser in full discharge of all agreements herein contained on our part, except the guarantee as to workmanship and material. It being understood and agreed * * * that we guarantee the ammonia compressor to have a refrigerating capacity equal to the melting of three tons of ice each twenty-four hours, and that when properly and regularly operated not more than twelve hours each day will do the work hereinbefore specified, providing a sufficient quantity of condensing water at not over 60 degrees to 75 degrees Fahr. is furnished by the purchaser, and all other obligations herein contained fulfilled. That we guarantee all workmanship and material, and will replace any part in which original defects of workmanship or material are found within one year. Repairs and adjustments not due to workmanship or materials are to be at the purchaser's expense. * * * That this agreement shall be binding, upon the parties hereto, after being duly signed by the purchaser and approved and accepted by an executive officer of this company. All previous communications, provisions, agreements or contracts, verbal or written, not contained herein, are mutually abrogated and withdrawn and no modification of this agreement shall be binding upon the parties or either of them unless such modification be in writing duly accepted by the purchaser and approved by an executive officer of the company. * * * Refrigerating Plant at Detroit, Michigan. Date Commenced June 1-12. Date Released June 12-12.

"WOLF, SAYER & HELLER,

"Chicago, Ill.

"Your engineer, H. F. Schubel, has this day completed the installation of our refrigerating machine, which conforms to the specifications and is now in successful operation. The same being satisfactory and accepted, I therefore release your engineer.

"C. D. PENDERGAST."

The entire question centers about what effect shall be given to the paper given to the engineer by the

defendant. We cannot present appellant's claim better than to quote from the brief of his counsel:

"These contracts contained certain guarantees as to the capacity of the machines sold and as to the workmanship and material entering into their construction. But another clause in the contracts provided that after installation the machines should be run for two days, and if at the end of that time they fulfilled the requirements of the contract, they should be accepted by the purchaser in full discharge of all the contract agreements except the guarantee of workmanship and material. * * * It was to guard against such contingencies as these that this provision was inserted. By force of it, if any machine so sold worked satisfactorily for two days under the erecting engineer's care, it was to be accepted by the purchaser in full satisfaction of all agreements in the contract of sale, except the guarantee of workmanship and material. The purchaser was given ample time to observe its type, capacity, and how it worked. If it did not do the guaranteed amount of refrigerating he was not required to accept it, but if it did and he accepted it, he was then forever foreclosed from objecting to the capacity, type or design of the machine. All that he could require under his contract was that Wolf, Sayer & Heller should during one year replace parts in which original defects in workmanship or material appeared."

The record makes it clear that defendant wanted a refrigerating machine in aid of his business, the payee in the note undertook to furnish a machine having a compressor of three-ton refrigerating capacity, with brine tanks and coils of certain capacity, and provided:

"5. That we guarantee the ammonia compressor to have a refrigerating capacity equal to the melting of three tons of ice each twenty-four hours, and that when properly and regularly operated not more than twelve hours each day will do the work hereinbefore specified, providing a sufficient quantity of condensing water at not over 60 degrees to 75 degrees Fahr.

is furnished by the purchaser, and all other obligations herein contained fulfilled.

"6. That we guarantee all workmanship and material, and will replace any part in which original defects of workmanship or material are found within one year. Repairs and adjustments not due to workmanship or materials are to be at the purchaser's expense."

The machine having the guaranteed capacity described was to be the result of a combination of material and workmanship. We think it an unfair construction of the effect of the paper given to the engineer to say that it did away with the agreement as to the guaranteed capacity of the machine.

The judgment is affirmed.

STONE, C. J., and KUHN, OSTRANDER, BIRD, STEERE, BROOKE, and PERSON, JJ., concurred.

JOZEPIAK v. DETROIT UNITED RAILWAY.

DAMAGES—TRIAL—REQUESTS—VERDICT.

Where plaintiff secured a judgment for \$1,000, which was not an unreasonable amount for personal injuries that she suffered in alighting from one of the cars of a street railway corporation, and, except in her pleading, there was no apparent claim of damages for permanent injuries, the court would not say, as a matter of law, that it was reversible error to refuse defendant's request to charge that there was no evidence of any injury for which damages could be awarded as for permanent injuries.

Error to Wayne; Van Zile, J. Submitted June 26, 1916. (Docket No. 134.) Decided September 27, 1916.

Case by Hedwig Jozefiak against the Detroit United Railway for personal injuries. Judgment for plaintiff. Defendant brings error. Affirmed.

Corliss, Leete & Moody and *Benjamin S. Pagel*, for appellant.

Barbour, Field & Martin (*Henry C. L. Forler*, of counsel), for appellee.

MOORE, J. The plaintiff was a passenger on one of defendant's cars, and was injured in alighting therefrom. It is her claim that when the car stopped she stepped from the car step to the pavement, and while so doing the car was started causing her to fall. Defendant claimed that plaintiff stepped from the car just before it came to a stop and while there was still enough motion to throw her off her balance. There was testimony to support each of these claims. The case was tried by a jury, and a verdict and judgment for \$1,000 was obtained by the plaintiff. The case is brought here by writ of error.

The defendant preferred 15 written requests. Nearly all of them were given in the general charge. The fourteenth request read:

"There is no evidence in this case of any permanent injury. This suit is brought by the plaintiff for the injuries which she alone suffered, and if you should find for the plaintiff you shall allow only such damages as will compensate her for same, and you must not take into consideration any expenditures which may have been made by her husband in her behalf since the accident nor the time which it is testified the plaintiff's daughter has spent at home engaged in housework since the time of the alleged accident."

The court did not give this request as written, but charged the jury:

"Should you find for the plaintiff in this case, you are to assess the damages— The woman, the plaintiff

herself, is a married woman. She could not recover for the amount paid out for her sickness, or doctor's bills. All those things the husband is liable for, and the reason of that is that he may bring suit for that amount. If she were allowed to recover for those things, there might be a double recovery. She is entitled to recover for the pain and suffering that she may have endured, if you find that her injuries resulted from the negligence of the defendant in starting the car, in a case where she herself was not guilty of contributory negligence. She is entitled to recover for the pain and suffering that she may have endured because of the injuries that she received. Now, you are to get at that. There is not any particular rule that I can lay down except that rule that it is to be determined by your good, common sense. You cannot sit down and figure it out with a pencil exactly. You have got to look over the case and see what the proofs are, remember what the injuries are, remember what she has suffered, what she, in your judgment will suffer, and determine how much this plaintiff ought to recover, not what you would undertake to bear this pain and suffering for, or any other person, but what should this plaintiff recover, this individual plaintiff recover; that is the amount of your verdict if you find for the plaintiff."

There are several assignments of error. Only one of them needs discussion, and that is did the court err in leaving out the first sentence of the request to charge: "There is no evidence of any permanent injury." Counsel insist the court erred, citing *Butler v. Railway*, 131 Mich. 617 (92 N. W. 101), *Kethledge v. City of Petoskey*, 179 Mich. 301 (146 N. W. 164), and *Matthews v. Lamberton*, 184 Mich. 493 (151 N. W. 563). The instant case is distinguishable from those cases, as will appear by reading the opinions.

One of the doctors testified in part:

"She suffers a great deal of pain upon pressure and shows a degree of spasm upon motion of the leg, especially abduction. Besides that, she has a condition that upon pressure of the knee or pressing upon the knee or tapping upon the heel, when the leg is ex-

tended, she suffers a great deal of pain, showing evidence at every movement of the leg, and walking giving rise to pain. She has also here-hypostatis joints, extremely sensitive to pain or touch. There are some markedly objective symptoms. * * *

"Q. What can you say about the continuation of this condition in your opinion?

"A. I think the condition— The continuation of traumatic neurosis always is very indefinite. It is hard to say how long it will last, when it will get well. I don't think it is possible to make any definite statement in regard to traumatic neurosis. The condition may last one year; it may last ten years. In view of the fact that this accident happened in June, 1914, the condition that she is now in, I would say it would be a long lasting condition. Any nervous condition, any shock to the nervous system, is always detrimental to the condition unless it improves in six months, usually tends downward. I think it can be said that traumatic neurosis that does not recover in six months is a long tedious one. I think the condition of her health will be delicate until she overcomes that. At the present time she is in a very irritable condition; the nervous system is in an irritable condition; she tires easily; she has a great deal of reflex pain, headache in the back of her head, also around her heart; the pains radiate like to the seat of an injury; the mental condition is also one that is easily exhausted, showing shock that she evidently sustained."

Another doctor gave similar testimony.

The important question litigated was as to how the accident happened. The jury evidently accepted plaintiff's version. The charge was clear, and, with the exception of the omission of the sentence quoted, was unobjectionable. It would have been well, as it was requested, to have told the jury that there was no evidence of permanent injury, but there is nothing in the record outside of the declaration to indicate that plaintiff was claiming for a permanent injury. There was evidence that plaintiff's suffering was not at the time of the trial ended.

The plaintiff was 40 years old. The verdict was for \$1,000. An examination of the record convinces us it would not have been less if the omitted sentence had been given.

Judgment is affirmed, with costs to plaintiff.

STONE, C. J., and KUHN, OSTRANDER, BIRD, STEERE, BROOKE, and PERSON, JJ., concurred.

BUTLER v. WATSON.

1. NEGLIGENCE — LANDLORD AND TENANT — PERSONAL INJURIES — LANDLORD'S OBLIGATION TO THIRD PERSONS.

Where defendants leased premises reserving a back porch for common convenience and use of all the tenants, and it extended across the rear of the entire building, they were liable to a minor child who was struck by a post that fell because insufficiently or insecurely nailed at the top, when it appeared that the infant was a guest of one of the tenants and was on the rear porch at the instance of a tenant, since the lessor was not governed by the general rule, in that he retained use of or control of the porch for the benefit of the several co-lessees.

2. SAME—COMMON USE—DUTY TO REPAIR.

The lessors were liable to any guest or person rightfully on the property that was reserved for the common use of the occupants, and, not having let the reserved portion to any of the tenants, might be said to be in control of the same, and it became their duty to exercise ordinary care for the safety of the persons about it.

3. SAME—PERSONS TO WHOM LIABLE.

Though it was claimed by defendants that they had objected to the presence of children on the porch, and de-

clined to lease the property to any person with children, it could not be said that a child one year of age, who was left with the lessee by his grandparents, was wrongfully there.

4. SAME—CONTRIBUTORY NEGLIGENCE—CHARGE.

And the trial court was correct in charging the jury that the infant was too young to be guilty of contributory negligence; also, that any negligence of the grandparents would not preclude recovery.

5. SAME—CONJECTURE.

The manner of plaintiff's injury could not be said to have been conjectural when the only doubtful question was whether the post struck it directly, or knocked against the child the person who accompanied it, or struck the two in falling.

Error to Kent; McDonald, J. Submitted June 12, 1916. (Docket No. 37.) Decided September 27, 1916.

Case by Ethel Butler, an infant, by next friend, against Frank F. Watson and another for personal injuries. Judgment for plaintiff. Defendant Watson brings error. Affirmed.

J. T. Preston, for appellant.

Rodgers & Rodgers, for appellee.

MOORE, J. The plaintiff, who was at the time of the injury about one year old, sued defendants as the owners of the building and the lessors of Warren Wainwright, the grandfather of the plaintiff. It is her claim that she was injured by a falling post upon the rear porch of the building which was not properly nailed at the top. The building stands upon the north side of Lyon street in Grand Rapids. The front of the building is close to the sidewalk on Lyon street, and runs back, including the rear porches, a distance of 100 feet, with an alley in the rear running east and west. The rear porches run the entire width of

the building 65 feet, and are about 14 feet wide north and south. Through the center of the porch defendants had placed a row of posts about 12 feet long and 6 inches square. The porch was used by such of the tenants as had occasion to use it. The building which is two stories high was occupied by some six or seven families, and on the west end of the first floor by a store.

On the day of the accident Frank Mitchell, one of the tenants, with the consent of the grandmother, in the afternoon took the plaintiff by the hand and led it through the rear hall door on to the back porch. When he got as far as the center post near the foot of the stairway he saw the post opposite the store window starting to fall; he stepped forward to catch the post and he was knocked over, and the child was also knocked over, her leg was broken, and it is claimed was severely hurt otherwise. Her leg remained in a case for more than six weeks. Suit was brought. At the conclusion of the plaintiff's case a motion was made on behalf of the defendant to direct a verdict for the defendant, which motion was denied.

Among other defenses it was claimed that the post did not fall because it was defectively nailed, but that it had been loosened by the piling by some of the tenants of heavy logs against it. The trial judge charged the jury at considerable length. He stated to them fairly the claims of the parties. We make brief extracts from his charge:

"As to the law applicable in this case, I might say that as a general rule there is no obligation on the part of a man or landlord who rents a house to keep it in repair, and that he is not liable for injury resulting from such want of repair. I mean by that, that ordinarily there is no obligation on the part of a landlord to keep a rented house in repair. The owner can rent a house in any condition and the tenant takes it as he finds it, unless there is a special agreement

that the owner will put it in repair and keep it in repair, that is the general rule. * * *

"In the absence of a special agreement the tenant takes the premises just as he finds them, but when a man leases a separate portion of a tenement building to different tenants, and as is claimed in this case, reserves control of the porch which is used in common by the tenants, it becomes his duty to keep the porch in a reasonably safe condition of repair, so that it may be reasonably safe for the uses to which it is put by the various tenants, but that is an exception to the general rule. * * *

"Applying that rule of law to the case before us, I instruct you that if you find that the defendants leased the premises in question and reserved control of the rear porch to be used in common by all the tenants, then it became the duty of the defendants to keep the porch in a reasonably safe condition of repair so that it would be reasonably safe for the customary and ordinary uses of the tenants; in this case for Mr. Wainwright and his family. But if the defendants failed to perform that duty and because of such failure injuries resulted, the defendants would be liable. * * *

"In most cases there is another element of the plaintiff's case, and that is that the plaintiff must show that she was not guilty of any negligence which contributed in any degree to the injury, but in his case the plaintiff at the time, as the proofs show, was a child of about one year of age and incapable of negligence which would contribute to her injury, and the negligence of any member of her family, her father or mother, or her grandparents, cannot be imputed to her, so that because of the tender age of the plaintiff, that element which is usually found in personal injury cases is not present in this case, and therefore it is not necessary for you to determine whether there was any contributory negligence. * * *

"I instruct you that one tenant cannot recover for damages against the landlord for injuries occasioned by the acts or neglect of another tenant occupying the same or a portion of same premises, and I instruct you that if the post which fell was caused to fall by the neglect or careless act of Frank Mitchell, in the

use of said porch, then I instruct you the plaintiff cannot recover."

The jury rendered a verdict for \$500. A motion for a new trial was made and denied. The case is brought here by a writ of error.

It is claimed by the defense:

(1) The plaintiff was not rightfully on the premises.

(2) That the Wainwrights were guilty of contributory negligence.

(3) That the manner of the plaintiff's injury is conjectural.

(4) That error was committed in relation to the admission of testimony that defendant Watson paid the doctor's bill.

(5) Wainwright and Mitchell had warning of the danger of piling the logs on the porch.

(6) The verdict is against the overwhelming weight of the evidence.

(7) Permanent injuries.

It is also claimed the charge of the court was argumentative and did not properly state the law of negligence.

1. Was the plaintiff rightfully on the premises? The claim that she was not is predicated upon the contention that in response to inquiries Mr. Wainwright, the grandfather of the child, stated when he rented the premises that the youngest member of his family was ten years or more old, and was told that defendants did not want to rent to parties having small children. Mr. Wainwright says he answered truly the question put to him as to the members of his family. The record shows that the mother of the child was separated from her husband and frequently made her home with her parents, Mr. and Mrs. Wainwright, and when she was at work the grandmother had charge of the infant.

A case in point is *Herd v. Koenig*, 137 Mo. App.

589 (119 S. W. 56), where the plaintiff was but ten years of age. We quote:

"It appears that the plaintiff was an invited guest of the Burgher family, and at the time of his injury was at play with the Burgher children in the yard, which was common to all of the tenants. Although it is true that the landlord is not bound to keep leased premises in repair in the absence of a covenant to do so, and is therefore not responsible in damages for injury to the person of the tenant or his guest resulting from the failure to repair (*Ward v. Fagin*, 101 Mo. 669 [14 S. W. 738, 10 L. R. A. 147, 20 Am. St. Rep. 650]), the rule is otherwise touching the matter of a common yard or court which is not let entirely to the use of one, but is reserved by the landlord for the common use of several tenants. Where several portions of a building or property are let to different tenants, with a part in common for the use of all, there is an implied obligation imposed by the law upon the landlord to exercise reasonable diligence to keep such common portions of the property in reasonably safe condition for such purpose as may reasonably be anticipated to be a proper use of the property for which it is let. The rule proceeds upon the theory that in such circumstances the landlord not having let the common portion of the property to any one tenant, he has reserved the control thereof to himself. Having thus reserved control, it is his duty to exercise ordinary care for the safety of those about the same, other than trespassers, or mere licensees. That is, for the safety of all persons who are rightfully upon the premises. *McGinley v. Trust Co.*, 168 Mo. 257 (66 S. W. 153, 56 L. R. A. 334); *O'Connor v. Andrews*, 81 Tex. 28 (16 S. W. 628); *Dollard v. Roberts*, 130 N. Y. 269 (29 N. E. 104, 14 L. R. A. 238); *Nash v. Mill Co.*, 24 Minn. 501 (31 Am. Rep. 349); 18 Am. & Eng. Enc. Law (2d Ed.), p. 220. The principle extends as well to a common yard occupied by several tenants of the same property as it does to a common passageway, hall, or stairway. *Udden v. O'Reilly*, 180 Mo. 650 (79 S. W. 691). That this yard was common to all the tenants, is established beyond question. * * * Plaintiff having been an invited guest of the Burgher

family, was neither a trespasser nor a mere licensee in contemplation of law, but on the contrary, he was rightfully upon the premises by an express invitation of the defendant's tenants and was therefore within the scope of defendant's obligation to exercise ordinary care for his safety. *Curtis v. Kiley*, 153 Mass. 123 (26 N. E. 421); *Roche v. Sawyer*, 176 Mass. 71 (57 N. E. 216). And where the property is let to a tenant for residence purposes, it is said such letting essentially contemplates that friends of the tenant's family will call upon and visit them, as is usual, without express invitation. Therefore the obligation of the landlord to exercise reasonable care, to the end of keeping the common portions of the property in repair, extends as well, on the doctrine of implied invitation, to friends of the tenant's family not expressly invited, who call or visit at their home. *Henkel v. Murr*, 31 Hun (N. Y.), 28."

In the case at bar the duty of the landlord did not rest upon any covenant to repair. It was a duty he owed by reason of the defective premises being in that portion of the premises over which the landlord retained control and which he did not rent to any tenant. Under these circumstances the landlord owed a duty to keep these premises in a safe condition, to every one who was rightfully there, including the tenants, their family, their guests, servants, and all those who were approaching or leaving their premises for legitimate purposes.

Whatever may be said as to what occurred between the older Wainwright and his landlord, it would be a harsh rule to say that a grandchild not a year old, left by its mother with its grandparents, was not rightfully on the premises.

2. The court told the jury that this infant child could not be guilty of contributory negligence, and that the conduct of the grandparents, if shown to be negligent, could not be held against it. The law applicable to this feature of the case is so fully discussed

in *Battishill v. Humphreys*, 64 Mich. 494 (31 N. W. 894), *Shippy v. Village of Au Sable*, 85 Mich. 280 (48 N. W. 584), *Boehm v. City of Detroit*, 141 Mich. 277 (10 N. W. 626), and *Slack v. Curry*, 177 Mich. 437 (143 N. W. 602), especially in the first-named case, that we content ourselves with simply calling attention to them.

3. Is the manner of the injury to the plaintiff conjectural? The only conjecture is whether the post struck both Mr. Mitchell and the child, or whether it hit the child first, or whether it knocked Mr. Mitchell down and he in turn knocked the child down. The record is clear that the proximate cause of the injury was the falling of the post, which it was claimed was improperly nailed by Mr. Watson.

4. An examination of the record will show that because of the manner of drawing out the testimony about the payment of the doctor bill there was no reversible error.

5. This assignment of error is fully met by the charge of the court that if the injury was caused by Mr. Mitchell's piling logs against the post there could be no recovery. The other assignments of error have been examined and are without merit.

Judgment is affirmed.

STONE, C. J., and KUHN, OSTRANDER, BIRD, STEERE, BROOKE, and PERSON, JJ., concurred.

PEOPLE v. KIMBROUGH.

1. CRIMINAL LAW—HOMICIDE—CORPUS DELICTI—ORDER OF PROOF—TRIAL.

Where respondent, a colored man, was convicted of the murder of an eight-year-old girl, whose body he cremated in the furnace of a manufacturing plant, of which he was in charge as a porter or caretaker, and at the trial his attorney objected to the order of proof because the *corpus delicti* should be first established, the conviction was not subject to reversal for the reason that some of the testimony given by various witnesses might have been presented in different order, involving the recalling of some of them at a later time, in the absence of prejudice to the accused.

2. SAME—CONDUCT OF COURT—PREJUDICIAL REMARKS.

During a controversy between counsel and the court relative to the admission of certain testimony in the order in which it was offered, the court did not commit reversible error by restricting the remarks of respondent's attorney or criticizing him for exceeding the limitations of propriety, etc.

3. SAME—EVIDENCE—COMPETENCY.

Although the trial court could exercise his discretion by allowing a cross-examination out of order of a witness who testified that he was a professor of anatomy in a reputable university, and allow an investigation into the qualifications of witness, it was not a matter of right and the refusal of permission to examine him concerning his qualifications was not error.

4. SAME—CROSS-EXAMINATION—WITNESSES.

The objection that respondent was asked about other felonies concerning which he insisted upon giving numerous details, and the results of the prosecution, was not well taken; respondent having offered himself as a witness, thereby subjecting himself to the same cross-examination as any other witness.

5. SAME—TRIAL—PRESENCE OF JUDGE—NEW TRIAL.

The absence of the circuit judge from the bench during the arguments of the respective attorneys for the State

and for respondent was not a reason for awarding a new trial when the court was in his room leading into the court room and was able to and did hear the arguments and re-entered the court room immediately if any objection or controversy arose, unless some showing of prejudice or harmful result was made.

6. SAME—TRIAL—CROSS-EXAMINATION.

Nor was the fact that several physicians were invited by the sheriff to attend the examination of a medical expert, and were invited to take chairs within the railing, an adequate ground for reversal, the court returning that at various times during the trial chairs were brought inside the rail for the use of the spectators: the management of this feature of the trial was within the discretion of the trial court.

Error to Saginaw; Gage, J. Submitted April 13, 1916. (Docket No. 126.) Decided September 27, 1916.

Charles Kimbrough was convicted of murder in the first degree and sentenced to life imprisonment at hard labor at Marquette. Affirmed.

Grant Fellows, Attorney General, and *Bird J. Vincent*, Prosecuting Attorney, for the people.

Robert J. Curry, for respondent.

BIRD, J. Respondent was convicted on a charge of murder in the Saginaw circuit court, and sentenced to life imprisonment. The evidence was circumstantial. It was the claim of the people that respondent murdered Rose Fernier, an eight-year-old girl, and afterwards burned her body in the furnace of the manufacturing plant of the Valley Sweets Company, where he was employed as a porter, when the girl disappeared. Rose Fernier lived with her grandmother on Hamilton street in the city of Saginaw. On Sunday evening, January 3, 1915, Rose was sent by her grandmother to a nearby restaurant on Hamilton street for

some articles of food. She went to the restaurant as directed, but not finding what she was ordered to get, started to return to her home. In doing so her way led her past the plant of the Valley Sweets Company. Just before she reached the plant she was observed by an acquaintance going in the direction of her home. Nothing was afterwards seen of her, although a thorough search was made. The following day pieces of human bones were found in the furnace of the Valley Sweets Company, which were shown to be the bones of a child between the ages of seven and nine years. It was claimed that respondent was at the plant at the time the little girl disappeared. Respondent reviews the proceedings of the trial court by writ of error, claiming that serious errors were committed on the trial.

1. Counsel objected seriously to the order of proof which prevailed at the trial. The basis of the objection was the rule that evidence of the *corpus delicti* shall be first introduced, and he asserts that nearly all of the evidence which tended to connect defendant with the crime was admitted in evidence before the testimony of Dr. McCotter was received, showing that the bones were human bones, and were the bones of a child between the ages of seven and nine years. There appears to be very little, if any, contention between counsel as to the rule in cases of homicide that all the evidence tending to prove the *corpus delicti* must be first introduced. Neither is there any contention over the rule that where items of evidence tend not only to prove the *corpus delicti*, but tend to connect the defendant with the commission of the crime, they are admissible at any time, but respondent insists that the trial court abused his discretion in allowing the respondent to be connected with the offense before it was established.

Had the body been found and been susceptible of

identification, the order of proof which was pursued undoubtedly would have been objectionable. The prosecutor was driven to establish the *corpus delicti* by circumstances, and the circumstances by which he established it were so interwoven with the testimony tending to establish the respondent's guilt that it was difficult to show one without incidentally showing the other. It is true there were some items of testimony that might have been segregated from the mass and introduced independently, and the witnesses afterwards recalled to testify to the facts which tended to connect respondent with the crime, but those cases were not numerous, and do not appear to have been harmful to respondent. No error in this regard is apparent.

2. The controversy over the order of proof engendered more or less heat between court and counsel. At one stage of the discussion the court remarked:

"If I could see the least reason for holding it would injure the defendant to introduce expert testimony at this time, instead of waiting until they completed their other evidence, I would hold with you. I cannot see any injury he could possibly suffer. It looks to me like a little attempt to prevent— I will withhold that.

"Mr. Curry: I take an exception to the remark of the judge."

The controversy ran on for a time when the following occurred:

"Mr. Curry: I took an exception when he went on the stand.

"The Court: Yes, you have your exception.

"Mr. Curry: It is not a matter of discretion; it is the absolute right this defendant has in this case.

"The Court: There is a Supreme Court at Lansing.

"Mr. Curry: This man hasn't any money. You are all aware of that fact.

"Mr. Vincent: I submit that this statement that this man has no money is improper after what this man is having done for him.

"Mr. Curry: They don't pay for an appeal.

"Mr. Vincent: I take an exception to that kind of a remark.

"The Court: Yes; I won't tolerate any more of this.

"Mr. Curry: I want a fair trial for the defendant.

"The Court: You will have a fair trial. I propose to see that you don't take advantage of matters that you don't have any right to.

"Mr. Curry: I take an exception."

Respondent's counsel urges that the remarks of the court were improper and prejudicial to the respondent, and tended to discredit counsel in the eyes of the jury. If any harm resulted to respondent from this controversy, it was due to counsel's persistence in urging his objections after he had the view of the court and his intimation that the court was not fair in his ruling. It could hardly be expected that the court would allow such an intimation to pass without resenting it. But I am of the opinion that it resulted in no harm to the respondent. Such colloquies between court and counsel are not unusual in the trial of causes, and especially in criminal cases, and the average juror knows it and understands it. He does not charge up against the client all the unpleasant things that may be said to counsel. We cannot assume that this disagreement between court and counsel over the rules of evidence would prejudice the jury against the respondent.

3. Dr. Rollo E. McCotter was sworn on behalf of the people and testified that he was professor of anatomy at the medical school at the University of Michigan, and that the particular branch of anatomy to which he gave attention was comparative anatomy. The prosecutor then began his examination, whereupon counsel interrupted and the following took place:

"Mr. Curry: I would like to ask a question as to his competency.

"Mr. Vincent: He will have an opportunity to cross-examine.

"The Court: I think we will take judicial notice of the fact that this gentleman, employed in that way, in Ann Arbor, that he is competent to testify on that subject.

"Mr. Curry: I take an exception.

"The Court: You may have your cross-examination"—after which the prosecutor proceeded with his examination.

Counsel assigns the refusal of the court to permit him to examine the witness as error.

The rule is stated in 5 Enc. of Evidence, p. 547, as follows:

"Though the court may in its discretion allow the opposing party to cross-examine an expert witness as to his qualifications before permitting him to give his opinion, such preliminary cross-examination is not a matter of right"—and cites the following cases in support of it: *Finch v. Railway Co.*, 46 Minn. 250 (48 N. W. 915); *Sarle v. Arnold*, 7 R. I. 582; *City of Ft. Wayne v. Coombs*, 107 Ind. 75 (7 N. E. 743).

While it is the usual practice for such a privilege to be granted to opposing counsel before the witness expresses his opinion, we are not prepared to hold that it is error to refuse it. It lies within the discretion of the trial court to determine finally whether the witness is qualified to give an opinion upon the particular subject. If he be satisfied of his competency to testify before the examination closes, we think he should be permitted to announce it and proceed to take his testimony. The cases in which the question has arisen are not numerous and appear to be somewhat in conflict, but we are inclined to accept the holding in the foregoing cases as the better rule.

4. The respondent was a witness in his own behalf, and admitted upon cross-examination that he had been

convicted of five distinct felonies, and in response to the prosecutor's questions he went into the details of each one of them. Complaint is made that the prosecutor had no right to demand the details of the several felonies. A review of the cross-examination of the respondent convinces us that respondent was more responsible for the details being given than was the prosecutor. In answer to the prosecutor's question of what offense he was convicted, he insisted upon giving the details of the offense charged and the outcome. He offered himself as a witness and in doing so he subjected himself to the same inquiries upon cross-examination as other witnesses. The extent to which the prosecutor pursued the inquiry was permissible under the authority of *People v. Howard*, 73 Mich. 10 (40 N. W. 789); *People v. Gray*, 135 Mich. 542 (98 N. W. 261); *People v. Parmelee*, 112 Mich. 296 (70 N. W. 577); *People v. Ecarius*, 124 Mich. 623 (83 N. W. 628); *People v. Higgins*, 127 Mich. 291 (86 N. W. 812); *People v. Bryan*, 170 Mich. 683 (136 N. W. 1120); *People v. Danenberg*, 176 Mich. 339 (142 N. W. 347).

5. A motion was entered for a new trial, and the reasons assigned therefor were the same as those upon which error was afterwards assigned. Two additional reasons are assigned which perhaps need some attention. A showing was made that the judge who presided at the trial was absent from the courtroom during the argument of counsel to the jury. The judge in reply shows that he was absent some of the time in his room, but that the door was open leading into the courtroom, and that he was able to and did hear the arguments, and that whenever any controversy arose and objection was made he immediately went into the courtroom. There is no showing that the absence of the judge resulted in any prejudice to the respondent.

In the absence of such a showing we cannot say it was reversible error. *Spencer v. Johnson*, 176 Mich. 278 (142 N. W. 582).

6. By another showing it was made to appear that when Dr. McCotter testified, a large number of doctors were invited by the sheriff to attend the examination, and that they occupied seats reserved for them within the bar, and that at no other time during the trial were chairs brought in and placed within the railing for the use of the public. Counsel says that the effect of this was to stage the testimony of Dr. McCotter and to give undue prominence to it, to the injury of respondent. It was admitted by the sheriff that certain doctors requested him to call them on the phone when Dr. McCotter was about to testify, and that in pursuance of this request, he notified several of them and they attended. That some of them sat within the bar and some outside, but he denies that seats were reserved for them, and denies that at no other time were chairs brought in and placed within the railing and occupied by the public. The judge returns that at many other times during the trial chairs were brought within the bar for the use of the public. Questions of this character pertain to the management of trials. Much is necessarily confided to the good judgment and discretion of the trial judge in the conduct of trials. He should prevent, so far as he reasonably can, all scenes and improprieties which would have a tendency to unduly injure the cause of either party to the controversy. Under the showing made we think there was nothing in the affair which calls upon us to review the conduct of the trial in this regard.

Error is assigned upon the argument of the prosecutor to the jury, but we find no ruling upon the objections. Therefore, under the rule, we shall not discuss them. *People v. Mulvaney*, 171 Mich. 272 (137

N. W. 155); *People v. Frontera*, 186 Mich. 343 (152 N. W. 1019).

So far as we are able to discern from the record, the respondent had a fair and impartial trial, and the judgment of conviction is affirmed.

STONE, C. J., and KUHN, OSTRANDER, MOORE, STEERE, BROOKE, and PERSON, JJ., concurred.

WELCH v. BEECHING.

1. CONTRACTS—PAYMENT—THREATS.

Where plaintiff brought suit against defendants to recover a payment alleged to have been made under threat of litigation for the debts of a banking copartnership, for which she was not liable, on account of coverture, testimony relating to the environment of the plaintiff, and that she supported herself and her children, whose number and age she described, was not improperly admitted.

2. SAME—ATTORNEYS—DURESS—TORTS.

An attorney for defendant, who started the action for equal share of the proceeds, was correctly made a party defendant and the court rightly declined to direct a verdict for him.

3. SAME—DEFINITION—CONTRACTS.

Duress exists where one by the unlawful act of another is induced to make a contract or perform some act under circumstances which deprive him of the exercise of free will: it may be defined as an unlawful restraint, intimidation, or compulsion resulting in the doing of some act contrary to the will or inclination of the doer.

4. SAME—GOOD FAITH—COVERTURE.

And although defendant and his attorney may have supposed they were entitled to start the action, they were not

excused from liability to a woman, away from home, sick or indisposed, threatened and informed by the lawyer that the law would be invoked against her if she did not pay the claim, and who paid under the fear excited by the threats.

Error to Van Buren; Des Voignes, J. Submitted June 14, 1916. (Docket No. 109.) Decided September 27, 1916.

Assumpsit by Minnie E. Welch against Charles Beeching and Earl L. Burhans to recover a payment made under duress. Judgment for plaintiff. Defendants bring error. Affirmed.

David Anderson and Wm. J. Barnard, for appellants.

Glenn E. Warner, for appellee.

MOORE, J. This action was begun in justice's court, and an appeal was taken from the judgment there rendered. On the trial in the circuit court the circuit judge directed a verdict in favor of defendant Crankshaw, and the jury returned a verdict upon which judgment was entered in favor of plaintiff against defendants Beeching and Burhans in the sum of \$150. The case is brought here by writ of error.

Before March, 1914, there was a bank known as the Farmers' & Merchants' Bank of Lawrence, Mich. The members of the bank were Mrs. Angie Clark, James H. Baxter, James L. Welch, and Minnie E. Welch, the plaintiff in this case, who was the wife of James L. Welch. The plaintiff was not an active member of the company, and had nothing to do with the management of the bank. March 30, 1914, a receiver for this bank was appointed.

Dr. Daune W. Crankshaw resided at Lawrence, Mich., and he desired to purchase a piece of land for-

merly owned by James L. Welch and Minnie E. Welch as tenants by the entireties, which had been conveyed to H. L. Thornburg. Mrs. Welch represented Mr. Thornburg in making the sale. She received the deed from Mr. Thornburg which she delivered to Dr. Crankshaw, and he submitted it to attorney Earl Burhans with the letter from Mr. Thornburg. Mr. Burhans learned from the letter that Dr. Crankshaw was purchasing the property for \$800, of which \$200 was to be loaned by Mr. Thornburg to Mrs. Welch. Mr. Burhans began in the circuit court an action wherein Charles Beeching was plaintiff and Minnie E. Welch defendant, and another suit against Dr. Crankshaw as garnishee defendant. Charles Beeching was an unsecured creditor of the Farmers' & Merchants' Bank.

After the papers in the suits were issued Mr. Burhans, who was prosecuting attorney, and the sheriff, went with the papers to Lawrence and to the office of Dr. Crankshaw. A conference was held in the private office of the doctor, after which the sheriff, in compliance with the request of Mr. Burhans, went to the home of Mrs. Welch and brought her in an automobile to the office of Dr. Crankshaw. What occurred there according to the version of the plaintiff appears in her testimony, which was, in substance, as follows:

"I am the plaintiff in this case; am wife of James L. Welch, and at present am living in Indianapolis. My husband was a member of the banking house known as the Farmers' & Merchants' Bank of Lawrence. The members of that banking company were James L. Welch, J. H. Baxter, Angie L. Clark, and myself. I never had anything to do with the active management of the bank. The bank failed March 26, 1914. We moved to Indianapolis June, 1915. I was back in Lawrence in August, 1915, and negotiated the deal of this real estate to Dr. Crankshaw. Mr. Thornburg told me that I could sell the property for \$1,000. I talked with Dr. Crankshaw about my circumstances and why I wanted the money, and I said: 'If you

will give me \$1,000 for that property I am to have \$200 for selling it.' He told me to write Mr. Thornburg that he would give \$800. I had arranged with Mr. Thornburg to get \$200 for commission and borrow \$200 of Mr. Thornburg, and I talked it over with the doctor, and decided that by selling it for the \$800 and losing my \$200 commission that it would put me in position to borrow \$200. So I wrote Mr. Thornburg. After some negotiations it was agreed that Dr. Crankshaw could have this property from Mr. Thornburg for the \$800; \$200 to be paid in cash. On August 5th the doctor gave me \$25 earnest money.

"Q. After the failure of this bank, tell the jury what you did to support yourself. * * *

"A. I nursed for Dr. Crowell whenever I could work. I took care of Mrs. Moon out in the country, and nursed at George Schafter's, and nursed a case in Chicago.

"Q. As to the condition of your health on the 17th day of August and still prior to that time, had you been under the care of Dr. Crankshaw?

"A. I had.

"Q. And in your custody how many children did you have?

"A. Three.

"Q. How old are these children?

"A. One 17, one 14, and one 10. * * * I think school was going to open in Indianapolis August 27th. I wanted to get home as soon as I could as soon as this deal was put through, because I didn't know whether the children had to register, and I wanted to get back as soon as I could to get ready for school. I saw Dr. Crankshaw at the post office on the morning of August 17th. He said Burhans was coming down and would bring down some papers, and said: 'There is some little entanglement I don't just understand what it is, but Burhans is coming down, and we will send for you when he gets here.' I went back home, and later Mr. Beattie came to the house with an automobile, and I went to Crankshaw's office with him. In the front room he introduced me to Dr. Emery and Mr. Beattie, and I sat down in the front office. In a few minutes Dr. Crankshaw asked me into the private office. In there Mr. Burhans explained the title to me,

and I became a little nervous, and I said: 'What am I to do, then, to get back tomorrow? I am not going to get the children to school.' And Burhans, hitting the arm of the chair, he says he would advise Dr. Crankshaw not to put any good money into this until he gets some good paper. I said: 'Well there is plenty of time to get that. Suppose you keep the remainder and pay me the balance of the \$200, and then I can go, and the remainder can be sent when this is straightened up.' Then Mr. Burhans said: 'Mrs. Welch, I have something that is not pleasant to tell you now, and I don't want you to get nervous.' And then he stated that he had started a suit to tie this money up so that I couldn't get it. And I said: 'Why, how is that?' * * * And I said: 'Mr. Burhans, if you knew that this was taking this from my children's mouths, the food that I need to feed them, would you take this just the same?' And he said: 'Mrs. Welch, there is also a little man out here in the country that has worked hard in the hot sun and tied up his money, and you have tied up his money in this bank over here.' I asked him who, and he went on and explained quite a little bit before he told me it was Mr. Beeching. Of course, I was frightened and I was very nervous—

"Q. Did you tell Mr. Burhans you were nervous?

"A. Well, they could see it. The doctor knew I was not well. I said: 'Doctor'—No; I said: 'Well, then, if that is the case, let's call the deal off, and I won't try to sell it; let Thornburg attend to his own business.' 'No,' he says, 'you can't do that; the doctor has bought it, paid \$25 on it.' And then I waited a minute, and I said: 'Doctor, would you loan me \$25? I must go back, and you know I haven't got any money; I told you so a little while ago.' And doctor kind of said: 'Y-e-s.' And Mr. Burhans then said: 'Well now, Mrs. Welch, I would rather give to you \$25 than to give it to the court, and you needn't borrow that \$25; if we can come to some negotiations here, we will pay you \$25 of it.'

"Q. During that time did you say anything about fighting that case?

"A. I can't tell just when I said it, but I did say: 'If I was well I would fight this to a finish.'

"Q. Was anything said to you by Mr. Burhans about your liability for the debts in the bank?

"A. Yes; he said when he was tapping on the chair and talking to me, he said: 'You are liable for the debts of this bank. You are a partner in this old firm and you are liable for its debts.' Of course, I won't dispute his word, but it seems to me that that was when I said to him: 'Why, Mr. Burhans, do you mean to say that they can also take my wages from my work if I go out and nurse?' And he explained that matter to me somewhere as he says he did.

"Q. Did you believe that statement and rely upon that statement that he made that you were liable for the debts of that firm?

"A. Well, I was so frightened I don't know what I did think, hardly. I never had had the sheriff or prosecuting attorney come after me before, and I was frightened.

"Q. Did you say anything further to him about declaring the deal off or about getting the children back to school?

"A. That was about all that was said, as I can remember about that. But he advised me that he was not my attorney, that he was against me, and that I better get counsel.

"Q. Now, Mr. Burhans said that you told him that this was not the first one of these debts that you settled. Did you say anything like that?

"A. When I was leaving the office to go out the back door, and they had all said 'Good bye' to me, I said: 'This is not the first debt that I have paid.' I didn't mean though in connection with the bank. I meant personal debts, and I have paid every one to my knowledge. We have managed to pay all little debts by close managing, except a little grocery bill at Albert Abrams', and he refused to take it. That is what I mean; I meant personal debts.

"Q. Now, do you recall anything further which was said or done there in Dr. Crankshaw's office before these checks were turned over?

"A. Well, about the time it was proposed not to— for to give me \$25 there, Mr. Burhans said: 'Get out your check book, Doc.' And the doctor got out his check book, I remember that; but it seems to me that

the checks were laid on the arm of my chair. We all sat right there, and it seems to me I wrote it right there. I can't remember exactly. I was awfully excited and frightened. But I know that I signed those checks. They told me which one to sign or to hand to Mr. Burhans and which one for me to keep.

"Q. And all you received of the \$175 was \$25?

"A. Out of the \$175; yes, sir.

"Q. Which way did you leave the office?

"A. Out the doctor's back door.

"Q. Were you crying at the time, as the doctor testified?

"A. Yes, sir; I didn't want to go out on the street."

On the cross-examination she testified:

"Mr. Burhans some time in the proceedings said that he had something to say that was not pleasant, and told me that he had started a suit against me.

"Q. And he told you that he believed he had a right to hold the whole \$800, didn't he?

"A. Well, he said so much, and I was so excited I couldn't tell you the exact words, but to that amount.

"Q. Didn't he tell you he believed he had a right to hold the whole \$800?

"A. Yes, sir; he did.

"Q. And that he believed that Mr. Thornburg really never was the owner of that property?

"A. And I told him that I had counsel from Mr. Cavanaugh that it was perfectly legal to sell the property before I sold it.

"Q. And did you tell him that you had counsel from somebody else?

"A. Yes; I think I did. I mentioned Judge Mills, because I did talk with Judge Mills about it.

"Q. And you told Mr. Burhans that you had counsel, and that you did have a right to sell it?

"A. Yes, sir; it was joint property. And I stated to him furthermore, I said: 'Mr. Burhans, that was bought with the money that the old Stearns farm sold for, property that I had when I was a girl, the place where I lived when I was a girl.'

"Q. Well, the point is this: Mr. Burhans said that he thought he had a right to hold the whole \$800, and you thought he didn't have a right to hold it all?

"A. Yes, sir; I was indignant about it.

"Q. Isn't it right then and there, when you was talking about the \$800, that you said you would fight it, if you ever said this?

"A. I couldn't say when it was. I couldn't say positively, but I know I said it.

"Q. What would be your recollection as to whether or not it was not when he was talking about holding the whole \$800?

"A. I said to him that this was not done with my own free will; if I was well I would fight it to a finish.

"Q. Now that is when he was talking about holding the \$800?

"A. I can't say now. I won't say positively, but it would seem to me it was almost before I was leaving, and after—My memory is now that Mr. Beattie was in the room when I said that. I think Mr. Beattie was in the room when I said that. Now, I won't say positively about that, because I can't remember.

"Q. Well, anyway, you said that if you was well that you would fight the case?

"A. Yes, sir; I furthermore said—looked at the doctor and told him that he knew I was not well.

"Q. From that you meant that you didn't believe that you were liable; is that a fact?

"A. I don't know what I did believe now.

"Q. If you had been well, you would have fought the case?

"A. Yes, sir; I would.

"Q. On the ground that you were not liable?

"A. But I felt that I must get back to Indianapolis, and I had got to save my children."

There was much more of her testimony than what we have quoted. Dr. Crankshaw and Mr. Burhans were called as witnesses by the plaintiff. There were other witnesses sworn. We have quoted from the testimony of the plaintiff because, if she is entitled to have her case go to the jury at all, it must be because of her testimony.

It is now agreed by all of the parties that, because plaintiff was a married woman, she is not liable to the creditors of the bank for its debts. It should be said

that Mr. Burhans claims he supposed he had the right to commence the suits he did commence, and to make the statements he did make about the plaintiff being liable for the debts of the bank.

Errors relied upon are stated by counsel as follows:

(1) Permitting plaintiff to testify as to how she had supported herself and as to the number and ages of her children.

(2) The refusal of the court to direct a verdict in favor of Beeching, or Burhans, or both, as asked for at the close of plaintiff's case.

(3) Refusal and failure to give defendants' requests to charge the jury.

(4) Errors in the charge as given.

We will take these up in the order presented:

1. It will appear later in this opinion that it is proper in these cases to show the environment of the person upon whom it is claimed duress has been practiced.

2. Mr. Burhans' testimony shows that he arranged to take the claim of Mr. Beeching upon shares, each to have one-half of what was realized. If the case was to go to the jury at all it should be submitted against both of the remaining defendants.

The remaining assignments may be considered together.

The charge of the court was very long. In it appears the following:

"It is the claim of the plaintiff that she was induced to pay the sum of \$150 by duress, and I instruct you that duress exists when one by the unlawful act of another is induced to make a contract or perform some act under circumstances which deprive him of the exercise of free will. Mere apprehension of threats of a civil proceeding or suit based on a summons and garnishment process in a civil proceeding to enforce a claim unaccompanied by any act of hardship or oppression does not render a payment in re-

sponse thereto involuntary in the sense that it can be recovered back.

"The question in this case is not, Did Beeching have a claim he could enforce if the suit had gone forward? The question is, Did he, through Attorney Burhans, coerce Mrs. Welch; that is, put her under duress so she was not able to exercise her own free will and agency and thereby was the payment rendered involuntary? If she was not deprived of her free will and agency, then the payment was voluntary, and your verdict should be no cause of action. To constitute duress it is not necessary that physical force be used. Duress is either of the person or of the property of a party, and if you believe from the evidence that, although no force was used, yet if by unlawful acts Mrs. Welch was induced to pay over the money under circumstances which deprived her of the exercise of free will, then I instruct you that the same was such duress as entitles her to maintain this action. In determining the question of duress, sex, age, state of health, and financial condition of the plaintiff should be considered. You have a right to inquire, Is the plaintiff strong and robust or nervous and irritable, and what effect, if any, did that have? Was she under all the circumstances in that condition of mind whereby she exercised a voluntary volition, free, and not under the coercion of others.

"The plaintiff in this case claims that the money involved was paid by her to Mr. Burhans under what is known in the law as duress; that is, the circumstances were such that she was not acting voluntarily and of her own free will in paying over this money to Burhans on the claim asserted against her.

"I instruct you, gentlemen, that if a claim is presented against a person, and that person voluntarily pays the claim, the money cannot be recovered back simply on the ground that it could not have been legally enforced had the person seen fit to contest the matter rather than pay it. So in this case, if Mrs. Welch saw fit to pay or settle this claim as she did rather than have a lawsuit, or in preference to the notoriety and publicity which would follow a contest, and that she was acting free and of her own volition, then she cannot recover it back, and your verdict should be for the defendant.

"If you find from the evidence that the defendant Burhans did not do anything or say anything which tended to frighten Mrs. Welch or give her cause to think that her person was in danger, or that her property or rights were in danger, but if, on the other hand, he only told her he had a claim for Mr. Beeching and had started a suit thereon, and would have a summons served on her and garnishment served on Dr. Crankshaw, and if he did not urge her to pay or to make settlement, but, on the contrary, told her he could not advise her, and that there was no hurry in the matter, and she had better take time and get counsel and advice, and she paid the money rather than take time and get counsel or to avoid notoriety and publicity, or the trouble and expense of a lawsuit, then she cannot claim to have been coerced, or that the payment was involuntary, and your verdict must be for the defendant. * * *

"The plaintiff has the burden in this case of satisfying you by a preponderance of the evidence of the elements of her claim. In arriving at the question whether the plaintiff has established her case by a preponderance of the evidence, you are not confined to evidence introduced on either side of the case. You may rely upon any evidence in the case; it matters not which party introduced it if it is sufficient to satisfy you of the fact and so proven by a preponderance of the evidence. * * *

"As I have just said to you, gentlemen, this is purely a question of fact, as it is now presented, and may be determined in these few words: Finally the question here is one of fact, namely, under the evidence, if Mrs. Welch exercised a free agency in what she did in the doctor's office when the check for \$150 was signed by her in the office of Dr. Crankshaw whereby the money went to defendant, if she had an opportunity to consider the matter, was advised of her rights, and knew and understood what she could do, and then chose the course taken as a result of a free agency, of her own volition, of her own free will, then plaintiff cannot recover, and you will return a verdict in favor of the defendant of no cause of action.

"Upon the other hand, gentlemen, if you find under the evidence there was a want of free agency, in what

Mrs. Welch did in the doctor's office when the check for \$150 was signed by her whereby the money went to defendant, she having no opportunity to consider the matter, that she was not advised of her rights, and did not know or understand her rights, and as a result she was deprived of a free agency, and the act done was not the exercise of a free volition, her own free will, then plaintiff is entitled to recover, and you will so say by your verdict."

The law of duress has been gradually undergoing modifications. In a recent work discussing the modern doctrine it is said:

"According to this view, what constitutes duress is matter of law; whether duress existed in the particular transaction is usually matter of fact, though, of course, the means may be so oppressive as to render the result an inference of law. There is no legal standard of resistance with which the person acted upon must comply at the peril of being remediless for a wrong done to him, and no general rule as to the sufficiency of facts to produce duress. The question in each case is: Was the person so acted upon by threats of the person claiming the benefit of the contract for the purpose of obtaining such contract as to be bereft of the quality of mind essential to the making of a contract, and was the contract thereby obtained? Under this theory duress is to be tested, not by the nature of the threats, but rather by the state of mind induced thereby in the victim. The means used to produce that condition, the age, sex, state of health, and mental characteristics of the alleged injured party, are all evidentiary, merely, of the ultimate fact in issue, of whether such person was bereft of the free exercise of his will power. Obviously what will accomplish this result cannot justly be tested by any other standard than that of the particular person acted upon. His resisting power, under all the circumstances of the situation, and not any arbitrary standard, is to be considered in determining whether there was duress." 9 R. C. L. p. 716.

It is said:

"Duress exists where one by the unlawful act of another is induced to make a contract or perform some act under circumstances which deprive him of the exercise of free will. *City National Bank v. Kusworm*, 91 Wis. 166 (64 N. W. 843, 845); *Wolff v. Bluhm*, 95 Wis. 257 (70 N. W. 73, 74, 60 Am. St. Rep. 115); *Batavian Bank v. North*, 114 Wis. 637 (90 N. W. 1016, 1019); *Philipps v. Henry*, 160 Pa. 24 (28 Atl. 477, 478, 40 Am. St. Rep. 706); *Peabody v. Tenney*, 18 R. I. 498 (30 Atl. 456, 457); *Newburyport Water Co. v. City of Newburyport* (C. C.), 103 Fed. 584, 594; *Hackley v. Headley*, 45 Mich. 569 (8 N. W. 511, 512). It may be defined as an unlawful restraint, intimidation, or compulsion of another to such an extent and degree as to induce such person to do or perform some act which he is not legally bound to do, contrary to his will and inclination. It is obvious that if the act is done contrary to the will and inclination of the injured party it cannot be in the exercise of his free will. His will is subjected to that of another, and he is compelled to submit to an illegal exaction because of the dominant power. *First National Bank v. Sargeant*, 65 Neb. 594 (91 N. W. 595, 597, 59 L. R. A. 296)." 3 Words and Phrases, p. 2268.

Again:

"'Duress,' under the decisions, means a condition of mind produced by improper external pressure or influence that practically destroys the free agency of a party, and causes him to do an act or make a contract, not of his own volition, but under such wrongful external pressure. Whether such external pressure or influence is sufficient to destroy the free agency of a party is a question to be determined by the age, sex, intelligence, experience, and force of will of the party, the nature of the act, and all the attendant facts and circumstances. *Pride v. Baker* (Tenn. Ch. App.), 64 S. W. 329, 332 (citing *Willard v. Willard*, 65 Tenn. (6 Baxt.) 297 (32 Am. Rep. 529))." 3 Words and Phrases, p. 2269.

In *Hackley v. Headley*, 45 Mich. 569 (8 N. W. 511), Justice COOLEY, speaking for the court, said:

"Duress exists when one by the unlawful act of

another is induced to make a contract or perform some act under circumstances which deprive him of the exercise of free will. * * *

"And the mere threat to employ colorable legal authority to compel payment of an unfounded claim is such duress as will support an action to recover back what is paid under it. *Beckwith v. Frisbie*, 32 Vt. 559; *Adams v. Reeves*, 68 N. C. 134 [12 Am. Rep. 627]; *Briggs v. Lewiston*, 29 Me. 472; *Grim v. School District*, 57 Pa. 433 [98 Am. Dec. 237]; *First National Bank v. Watkins*, 21 Mich. 483."

See, also, *Cribbs v. Sowle*, 87 Mich. 340 (49 N. W. 587, 24 Am. St. Rep. 166), and *Bentley v. Robson*, 117 Mich. 691 (76 N. W. 146); *Foote v. De Poy*, 126 Iowa, 366 (102 N. W. 112, 68 L. R. A. 302, 106 Am. St. Rep. 365).

We have not overlooked *Beath v. Chapoton*, 115 Mich. 506 (73 N. W. 806, 69 Am. St. Rep. 589), and *Voorhees v. Nelson*, 189 Mich. 684 (155 N. W. 708), but in these cases legal authority was not used to enforce an unfounded claim.

We have in the instant case a woman away from home, confronted with an unexpected situation, told by a lawyer that the law could be successfully invoked and would be invoked against her unless the money was paid. It is now admitted that, however honestly these statements may have been made, they were not true. The woman says she was sick, nervous, and frightened, and did not know what to do.

Under the authorities cited we do not think the trial judge could dispose of the question as a matter of law, but that he properly submitted it to the jury.

Judgment is affirmed, with costs to the plaintiff.

STONE, C. J., and KUHN, OSTRANDER, BIRD, STEERE, BROOKE, and PERSON, JJ., concurred.

SHERRARD v. MURPHY.**1. VENDOR AND PURCHASER—INJUNCTION—BUILDING RESTRICTIONS—BREACH OF COVENANT.**

The owners of Fox Creek subdivision in Detroit sold to a purchaser by land contract one lot, upon the restriction that buildings should face an avenue named, not nearer than 20 feet from the front line, and prohibiting open drainage; also, that no building should cost less than \$2,000. The assignee of the contract undertook to erect a structure of less than the value agreed upon, and complainants filed their bill to enjoin the breach of covenant. In part of the subdivision covered by the restrictions some building had been done of which only a small proportion complied with the covenants in the conveyances. This condition for the most part existed when the defendants purchased. *Held*, that the owners could make the restrictions a condition of any sale, and did not lose their rights because former buyers had violated the covenants.

2. SAME—COVENANTS—ESTOPPEL.

As to a successor in title of the contract purchaser, the vendors were not estopped by any acts done before the contract was executed.

3. SAME—BUILDING RESTRICTIONS—ESTOPPEL.

The vendors, who still owned several lots, in the subdivision, could enjoin the erection of the building proposed by defendant, where the other purchasers had not substantially changed the character of the residence district and the prior violations were only temporary; the court finding that the restriction was still valuable to the grantors.

Appeal from Wayne; Hally, J. Submitted June 14, 1916. (Docket No. 93.) Decided September 27, 1916.

Bill by Charlotte B. Sherrard and others against Thomas Murphy and Catherine Woods for an injunction. From a decree for complainants, defendant Murphy appeals. Modified and affirmed.

Angell, Bodman & Turner, for complainants.

Bishop & Kilpatrick, for defendants.

BROOKE, J. Plaintiffs in this cause are owners of Fox Creek subdivision in the city of Detroit. Lot No. 484 of said subdivision was sold to a Mr. Gannon under a land contract dated February 15, 1911. The restrictive clause contained in said contract was as follows:

“The said party of the second part further expressly covenants with the said parties of the first part, and it is a further condition of this conveyance, that all buildings erected or placed on said property shall face Ashland avenue and shall not be nearer than twenty (20) feet to the front line of said avenue; that no building so erected or placed shall cost less than two thousand dollars (\$2,000.00); that there shall be no direct or open drainage from any building of any character on said property into Fox Creek, and that said party of the second part, her heirs and assigns, shall not do anything to impair, obstruct or in any way interfere with the flow and free use of Fox Creek as a common waterway by the owners of the lots in Fox Creek subdivision, nor with the improvement thereof for the purpose of navigation.”

On November 16, 1911, Gannon, with the consent of the vendors, assigned his contract to Thomas Woods. On May 22, 1912, Thomas Woods by an independent contract, which did not contain the restrictive clause, sold lot No. 484 to the defendant Thomas Murphy. No notice of the sale by Woods to Murphy was given plaintiffs, and later, the full consideration having been paid plaintiffs, a deed was executed by them to Catherine Woods, mother and sole heir at law of Thomas Woods, deceased, dated April 10, 1915. This deed contained the same restrictive covenant which had been inserted in the Gannon contract, and which is quoted above. Later Mr. Woods conveyed said lot to the de-

fendant without restrictions. Defendant having undertaken to erect a structure on the back end of the lot here in question of the value of from \$500 to \$700, plaintiffs filed their bill of complaint to enjoin the erection of said building.

It was the contention of the defendant in the court below, and he makes the same contention here, that the plaintiffs by their acquiescence in repeated breaches of the restrictive clause should now be held to have estopped themselves from insisting upon its observance by the defendant. This contention is based upon the following situation: We quote from the opinion of the learned circuit judge:

"In that part of the subdivision covered by the restrictions above enumerated, that is, those that pertained so expressly to Fox Creek, there are 60 lots. There lots have been built upon over a period of about five or six years. Most of the building was done previous to the recent season and before the institution of these proceedings. It appeared in testimony that since Mr. Murphy got possession of the lot from Mr. Wood that the general aspect of the place has changed but little. There are, all told, 33 structures upon these 60 lots. Of these 33 structures, 4 of them comply with the restrictions that have been enumerated; 10 of these structures are residences the year around; 4 are exclusive boathouses; 6 have no accommodations for boats at all; and 13 are designed to receive boats and to house people. Of the 33 structures, 29 are built facing Fox Creek and only 4 are built facing Ashland avenue. The structures are of all characters, one and two story, even some flats or buildings that are used by more than one family. The vast majority of them are very modest structures—many of them would be called 'shacks.' The defendant's is intended for a residence and is being erected on the rear of the lot facing Fox Creek. It will cost about \$700. Before the defendant got his deed he was apprised of the restrictions."

It should perhaps be added that the 60 lots mentioned in the excerpt above all lie between Ashland

avenue and Fox Creek. There are, of course, an equal number of lots on the west side of Ashland avenue besides one or two other parallel streets running from Jefferson avenue to the lake in the same subdivision, all of which may be said to be in some measure influenced for good or ill by the observance, or failure to observe, the restrictive clause in question.

There can be no doubt that upon many, perhaps nearly one-half, of the 60 lots lying between Ashland avenue and Fox Creek violations of this clause have occurred. The structures so violating the restriction are for the most part erected upon the rear end of the lots along Fox Creek, and are used for boathouses or summer dwellings, the same structure sometimes being used for both purposes. This use of the lots in question appears to have been made by the owners and suffered by the vendors at a time when Ashland avenue was unpaved and without sewer or water. The street is now paved and has both sewer and water, and its later developments on both sides appear to be in harmony with the restrictive clause.

It seems quite certain that many, perhaps most, of the structures abutting on Fox Creek are either temporary in character or designed for use as boathouses, thus leaving the front of each lot free for the fulfillment of the restriction when built upon.

The record fails to show that the complainants, with a single exception, have permitted any breach of the restrictive clause under contracts or deeds issued since the Gannon contract was made. The exception noted involves the lot adjoining that owned by defendant, the owner of which was permitted to erect a small structure upon the rear end under an agreement to comply with the restriction within two years. While upon the stand defendant refused to enter into a similar agreement.

It is asserted by plaintiffs, and with this assertion we agree, that if the lots upon which the buildings which offend the restrictive clause had been sold either with or without restriction and those buildings erected thereon prior to the sale of the lot in question to Gannon, it would still have been competent for plaintiffs to have lawfully restricted the use which Gannon should make of his lot. This defendant may urge as estoppel only such acts or omissions on the part of the plaintiffs affecting the restrictive clause as have occurred since the making of the Gannon contract which is the basis of his title. *Reilly v. Otto*, 108 Mich. 330 (66 N. W. 228).

We have no doubt that the restriction, considering the number of lots still owned by plaintiffs in the subdivision, is one of value to them, and we are not convinced that the breaches thereof which have occurred will ultimately operate as an entire or even substantial change in the neighborhood, as it would have been had the restrictive clause been observed.

Under such circumstances relief should be granted. *Misch v. Lehman*, 178 Mich. 225 (144 N. W. 556). The decree enjoining the erection of the proposed structure at the present time is therefore affirmed. The right of defendant to erect any suitable building upon the rear end of the lot *after* compliance with the restrictive clause as to the erection upon the front of the lot does not appear to be questioned.

The decree will be modified in this particular and, as so modified, will stand affirmed, with costs.

STONE, C. J., and KUHN, OSTRANDER, BIRD, MOORE, STEERE, and PERSON, JJ., concurred.

THOMAS v. ROSECRANTZ.

FALSE IMPRISONMENT—PROCESS—AFFIDAVIT—CAPIAS AD RESPONDENDUM.

Where the son of plaintiff, in a negligence case for the killing of two horses, made an affidavit for a *capias ad respondendum*, under 3 Comp. Laws, § 9999 (re-enacted, Judicature Act, 3 Comp. Laws 1915, § 12416), which was found to be technically defective, but set up facts showing a sufficient cause of action, and where the defendant afterwards brought an action for false imprisonment, the writ was a good defense, the affiant having and showing personal knowledge of the facts, though failing to allege the ownership of the team.

Error to Calhoun; North, J. Submitted June 14, 1916. (Docket No. 90.) Decided September 27, 1916.

Case by Emmerson E. Thomas against Ralph Rosecrantz and Erva J. Mallory for false imprisonment. Judgment for defendants on a directed verdict. Plaintiff brings error. Affirmed.

James M. Powers, for appellant.

Robert H. Kirschman, *Clyde Cortright*, and *A. F. Cooper*, for appellees.

STEERE, J. Plaintiff brought this action to recover damages for false imprisonment from defendants whom he charges as responsible for his unlawful arrest on October 29, 1915, at the city of Battle Creek, on a defective writ of *capias ad respondendum* issued out of and under the seal of the circuit court of Calhoun county, in an action for tort commenced against him by one Ransom W. Rosecrantz. Before said writ issued the circuit judge of Calhoun county indorsed an order that defendant Thomas, plaintiff herein, be

held to bail in the sum of \$500. Attached to the writ was an affidavit made by defendant Ralph Rosecrantz as agent for said Ransom W. Rosecrantz. Defendant Mallory was sheriff of Calhoun county and served the writ.

On November 12, 1915, Thomas moved the circuit court of Calhoun county for an order quashing the writ and discharging him from custody, on the ground that the affidavit upon which the order to hold to bail was made was not sufficient. The motion was argued and granted upon the same day it was made and Thomas was discharged from custody, but the case against him was allowed to proceed under the summons clause of the writ. Following his discharge from custody Thomas commenced this action for false imprisonment against defendant Ralph Rosecrantz, who made the affidavit, and defendant Mallory, the sheriff who arrested him. Defendants pleaded the general issue and gave notice of justification under the writ.

The case was brought on to be heard March 22, 1916, and after the testimony of plaintiff had been taken in part, it being conceded that the capias and affidavit in question were the only authority under which defendants sought to justify, it was agreed that the case should be first submitted to the court upon these legal questions, reserving the right to take further testimony if the question of damages was reached. After argument upon the questions submitted, counsel for defendant asked for a directed verdict of no cause of action, and plaintiff's counsel for a directed verdict in his favor, and that the question of damages be submitted to the jury.

The view and reasons of the trial court in holding that the process, though defective, afforded protection from liability for false imprisonment is thus concisely stated in its charge directing a verdict for defendants:

"While there was a technical defect in the affidavit upon which the writ of *capias* was issued, still the process of the court was sufficiently regular in my judgment to protect the sheriff and also to protect the other defendant who made the affidavit and at whose instance the writ was issued. As soon as the defect in the process was called to the attention of the court the defendant was released from custody. The subject-matter of that suit in my judgment was one over which the court had jurisdiction; it was a proper suit and a proper situation in which to apply for a writ of *capias* and to cause the same to be issued and served as the commencement of suit, and the fact that it was subsequently made to appear to the court that the affidavit upon which the *capias* was issued was technically defective would not render the party who applied for the writ or the sheriff who executed the writ liable for damages in such a suit as is now pending in this court."

The subject-matter of that suit (*Rosecrantz v. Thomas*), as appears in the affidavit found by the court technically defective, is in brief that on October 23, 1915, while operating his automobile along a public highway of the county at night, without sufficient lights or sounding any warning of his approach, Thomas ran into affiant (Ralph Rosecrantz), who was lawfully traveling with a team and wagon along and on the proper side of the highway, throwing him from the wagon and frightening the horses he was driving so that they became unmanageable and broke away from him, running to and upon the right of way of the Michigan Traction Company, where both were killed by coming in contact with its electric rail, by reason of which "said plaintiff has a claim for damages against the defendant named in the annexed writ," etc. While deposing that he was agent of said Ransom W. Rosecrantz, plaintiff, in whose behalf he made the affidavit, and that he had personal knowledge of the facts and circumstances, affiant refrained from

disclosing, unless by inference, that said plaintiff in whose behalf he made the affidavit owned or had any interest in the horses whose death was imputed to the tort of Thomas.

The exact grounds upon which the trial court held this affidavit insufficient are not shown, but those stated in Thomas' motion to quash the writ and discharge him from custody are that "no sufficient facts are set forth in the affidavit annexed to said writ, to authorize the issuing of said writ, and the arrest and holding to bail of said defendant"; that it does not "set forth any facts or circumstances showing, or tending to show, that the said plaintiff suffered any damage or injury whatever to his person or property by reason of the acts complained of as set forth in said affidavit," nor "the nature of the plaintiff's claim for damages." While the affidavit is rather meager in detail and inartistically framed, the facts set out are upon personal knowledge, and in outline disclose actionable misconduct on the part of Thomas with a perhaps too remote inference that Ransom W. Rosecrantz was the victim. So far as facts were stated, it presented a situation, as stated by the trial court, indicating a cause of action proper to be commenced by *capias*. It was found "technically defective," and the writ, upon Thomas' application, was quashed, as a warrant, releasing him from arrest, but not free from liability in the action, which was allowed to stand under the summons clause. In that action the court had, and retained, jurisdiction of both the person and subject-matter.

It is contended in behalf of plaintiff that the affidavit annexed to the writ under which he was arrested gave the circuit judge no jurisdiction to indorse the order to hold to bail, that the order being beyond his jurisdiction the writ was invalid and void, furnished no protection to any one causing or participating in the arrest, therefore defendant's liability for falsely

imprisoning him inevitably follows as a matter of law, and the court should have so instructed the jury.

Although various other authorities are cited in support of this contention, it is said and particularly urged in plaintiff's brief that this case is controlled by the decision of this court in *Wachsmuth v. Bank*, 96 Mich. 426 (56 N. W. 9, 21 L. R. A. 278). While it is contended for defendants that the well-recognized distinction between the special and limited jurisdiction of a justice or commissioner and that of a judge of a court of general jurisdiction renders the *Wachsmuth Case* and others of like import in which the warrant emanated from an officer of limited or special jurisdiction inapplicable here; and that, on the other hand, *Johnson v. Morton*, 94 Mich. 1 (53 N. W. 816), in which the *capias* was authorized by a circuit judge, applies and is controlling.

Section 9998, 3 Comp. Laws (3 Comp. Laws 1915, § 12415), authorizes commencement by *capias* of personal actions not arising out of contract relations, where an order for bail, directing the amount, is indorsed on the writ "by a judge of the court from which the writ issues, or a circuit court commissioner." Section 9999 (3 Comp. Laws 1915, § 12416) provides:

"Such order shall be made only upon the affidavit of the plaintiff, or some person in his behalf, showing the nature of the plaintiff's claim, and such affidavit shall be annexed to, and returned and filed with the writ, and the defendant shall be held to bail in the amount specified in such order; and the court into which such writ is returnable may, on motion of either party, diminish or increase the amount for which bail shall be so ordered."

In the *Wachsmuth Case*, *supra*, affirming a judgment for false imprisonment, it is pointed out that the order to hold to bail in the sum of \$2,000 was indorsed by a

circuit court commissioner on an affidavit which on its face affirmatively showed no right of action. Of this the court said:

"The officer indorsing the order was one of special and limited jurisdiction. * * * So far from setting forth any facts and circumstances tending to show grounds for granting the order, the affidavit expressly negated any liability whatever to the plaintiff. The defect was therefore jurisdictional, and the order was absolutely void," etc.

In the *Johnson Case*, *supra*, also an action for false imprisonment, plaintiff had been arrested upon a writ of *capias*, indorsed by the circuit judge with an order to hold to bail, and a motion to quash the writ on the ground that the affidavit was insufficient was denied, but on application to this court a *mandamus* was issued directing that the writ be vacated and the proceedings quashed, following which plaintiff brought an action of trespass for false imprisonment against the party making the affidavit. It was held, even though the writ had been vacated and proceedings quashed, the order to hold to bail made by the circuit judge protected the party applying for the writ. Of the affidavit this court said (speaking through Chief Justice McGRATH, who also wrote the opinion in the *Wachsmuth Case*):

"It is evident that this affidavit lacks in detail and in certainty, and for that reason it is insufficient; but it cannot be said that it sets forth no facts or circumstances indicating fraud or breach of trust,"—
which was the tort charged.

Holding that the affidavit had a legal tendency to make out a case inasmuch as the facts and circumstances indicated fraud and breach of trust, the court said in conclusion:

"The determination of the judge must be held to have all the qualities of a judicial decision, and as such protects the judge, the officer, and the party."

Even under the test of limited and special jurisdiction contended for by plaintiff, the affidavit complained of here, as before pointed out, stated the essentials of a tort action, to the personal knowledge of affiant who deposed that he acted as agent of plaintiff, who by reason of said tort had a claim against the tort-feasor for the described misconduct. Even though slight and inconclusive it cannot be said that there was such a total absence of evidence upon the fact that the judge who indorsed the order, from whose court the writ must issue, and was vested with a degree, at least, of discretionary power, might not from the affidavit considered in its entirety draw a reasonable and legitimate inference that plaintiff owned or was interested in the property shown to have been injured by the stated tort, even though in a direct proceeding to set aside the *capias* the affidavit was of such scant weight, uncertain and lacking in details as to render the order allowing an arrest erroneous.

"In stating the cause of action, the affidavit will be sufficient if it disclose in clear and intelligible language the circumstances which gave rise to the subject of complaint with sufficient distinctness to enable the judge, in the exercise of his discretion, to collect from it that the plaintiff has been damnified, and in such a manner that if untruly stated the deponent may be indicted for perjury, although the affidavit might have been framed in more formal terms." *Bennett v. Benson*, 25 N. J. Law, 166.

In *Forbes v. Hyde*, 31 Cal. 342, discussing the question of want of jurisdiction by reason of defective affidavit, the court said:

"There is a marked distinction between an affidavit which presents some evidence on the vital point, but clearly of a character too unsatisfactory to justify an order for publication of summons based upon it, and an affidavit which presents no evidence at all tending to prove the essential fact. In the former case the judge might be satisfied upon very slender and in-

conclusive testimony; but there being some appreciable evidence of a legal character, which calls into action the judgment of the judge, he has jurisdiction to consider and pass upon it."

But beyond this, we are unable to discover that the doctrine announced by this court in the early case of *Ward v. Cozzens*, 3 Mich. 252, has ever been directly questioned or overruled in subsequent decisions. Plaintiff there brought an action for false imprisonment against defendant for causing his arrest upon a *capias* claimed void owing to insufficiency of the affidavit on which the order allowing it to issue was based. The order was made by a judge of the United States Circuit Court for the District of Michigan. Of such courts it was said that they—

"are courts of limited but not inferior jurisdiction. Their limitation applies to the persons of the parties and the subject-matter of the action. When, therefore, these come within their jurisdiction, they stand upon the same footing of all other superior courts of general common-law jurisdiction. * * * A *capias ad respondendum* is a process of that court. But it is insisted that the affidavit did not disclose such a state of facts as authorized the making of the order. If that be so, the judge erred. It was a matter submitted to his judgment, he acted upon it, and made the order."

In concluding the opinion the following general rule was stated:

"All the authorities are very clear, that a judge of a court of record cannot be held responsible for any acts done by him in his official capacity, and they are equally clear, that in no instance can his orders, judgments, or decrees be treated as nullities" (citing numerous cases to which others might now be added). "The foregoing authorities establish this proposition, that in all cases where the parties act within the power and scope of an order of the superior court, without reference to their jurisdiction, and of an inferior court, when having jurisdiction, they are protected. The

same immunities that are extended to the members of the respective courts are extended to the parties."

For the foregoing reasons the judgment of the trial court is affirmed.

MOORE, BROOKE, and PERSON, JJ., concurred with STEERE, J.

STONE, C. J., and KUHN, OSTRANDER, and BIRD, JJ., concurred in the result.

WHITTEMORE v. WALTER.

1. MALICIOUS PROSECUTION—ADVICE OF PROSECUTING ATTORNEY—
CHATTEL MORTGAGE.

In an action for malicious prosecution, in which plaintiff declared against the defendant for wrongfully causing plaintiff's arrest under a criminal charge for fraudulently disposing of hogs mortgaged to plaintiff, the general charge of the court that the advice of counsel, followed in good faith, after a full and fair statement of all the material facts, is a defense to an action for malicious prosecution, though the facts so stated do not justify the advice given, and that if the defendant went to the prosecuting attorney and made a full and fair statement of all the material facts in the case, and the prosecuting attorney advised him that he had a right to make complaint against plaintiff for disposing of the chattel mortgage property under the statute, and defendant, in good faith, followed the advice of counsel, that would be an absolute defense, but it would not be such defense if the statement was not full and fair, the court sufficiently covered a request that in placing the facts before the prosecuting attorney defendant was not required to be the judge of what was material and necessary and was only required to state the case as he fairly understood it, etc.

2. SAME—EVIDENCE—INSTRUCTIONS TO JURY.

It was not error to admit evidence competent for one purpose and incompetent for another under instructions as to extent, the manner and limitations under which it could be considered. And, hence, where it was claimed by plaintiff that he had defendant's permission to sell the hogs in question and apply the proceeds on the chattel mortgage, the testimony was admissible on the question of intent, if not for the purpose of showing a variation in the terms of the mortgage, and the jury were properly instructed to consider it for the one purpose, only.

3. SAME—EVIDENCE—DIRECTED VERDICT.

Held, also, that the trial court did not err in submitting to the jury the claim of plaintiff that he had permission to sell the animals when they became fit to market.

Error to Shiawassee; Miner, J. Submitted June 20, 1916. (Docket No. 46.) Decided September 27, 1916.

Case by Ira H. Whittemore against Lewis Walter for malicious prosecution. Judgment for plaintiff. Defendant brings error. Affirmed.

A. L. Chandler and E. F. Wilson, for appellant.

George G. Hunter and William M. Smith, for appellee.

STEERE, J. Plaintiff obtained a verdict and judgment for \$200 against defendant in an action for malicious prosecution arising from the latter having made complaint and caused plaintiff's arrest under a criminal charge of fraudulently disposing of five hogs covered by a chattel mortgage he had given defendant, with intent to injure and defraud.

On November 21, 1914, defendant, Walter, who was the tenant on a farm in Saginaw county owned by a Mr. Hoffman, sold to plaintiff, Whittemore, a half interest in certain live stock, tools, hay, grain, ensilage,

etc., located on the Hoffman farm, surrendering to Whittemore possession of the property and premises with the approval of Hoffman who owned the other half of the personal property and accepted plaintiff as tenant in lieu of Walter. The personal property was inventoried, and a purchase price agreed upon between the parties of \$1,459 for Walter's half interest, upon which Whittemore then paid \$500 down, giving for the deferred balance three notes for \$150 each serially payable in four, seven and ten months, and one for \$500 payable in twelve months, amounting to \$959, secured by a chattel mortgage upon the personal property so purchased, signed by Whittemore and his wife.

Plaintiff claimed and testified that at the time the \$500 cash was paid and papers given an estimate was made by Walter as to the amount of ensilage and hay, and conditionally accepted and agreed upon in closing the deal, with the express understanding that the same would be shortly after measured by them, and if the estimate proved too large Whittemore should be credited with the difference, or, if short, the difference should be added to what he owed Walter; that pursuant to this agreement he and Walter, in the presence of Hoffman, who owned the other half, measured the ensilage and hay, finding that they had been overestimated, and it was then and there agreed on that account that there was due Whittemore for the over estimate \$41.25, which he in the presence of Hoffman requested, and defendant agreed, should be indorsed on his first note. He also claims, and introduced oral testimony, against objection, that although all the hogs on the place were included with the personal property covered by the chattel mortgage as well as the food for stock then there, it was talked, understood, and expressly agreed between the parties that he had the right to feed the animals with the supply of food on

hand and to sell the hogs when sufficiently aged and properly fattened.

Walter admits that he gave plaintiff the right to feed the ensilage, corn, hay, etc., to the stock, and that it was the understanding he should have the right to sell the stuff then covered by the mortgage when fit for sale "if it was applied on the mortgage," and, while there was nothing said about the hogs, he supposed such right would apply to them when fit to sell. Asked in regard to Whittemore's claimed agreement relative to the \$41.25 deduction for hay and ensilage, he answered, "I will say I don't remember of any such thing," and when asked if that was as strong as he would put it, answered, "Yes," positively denying, however, that he ever said it was all right and he would indorse it on the note. Of this Hoffman, who was present when the hay and ensilage were measured, testifies:

"The figures showed that Whittemore had paid \$41.25 too much and I mentioned the fact. They seemed to agree to that, and Mr. Walter pulled out his pocketbook, saying: 'I will pay you now,' to which Mr. Whittemore replied, 'No; indorse that on the first note. I have got five hogs here in the fattening pen. They will be ready to go soon, and when they are ready, I will take them away, and it will save me hunting you up.'"

Included amongst the hogs listed in the chattel mortgage were "eight black and white shoats six months old." In December plaintiff sold five of these shoats for \$66.96, paying \$33.48 to Hoffman, who owned the half interest in them, but kept the other half of the money received, telling Walter, however, that he had sold them.

Whittemore claimed that after taking possession of the premises he discovered several things were not as represented; that a mare included in the sale at \$150,

and warranted by Walter as sound, proved unsound, and that the ages of other horses had been misrepresented to him; also that a large hog included in the sale was taken away to the butcher by Walter, and not accounted for. He made complaint of this, and some friction arose between the parties, with claims and counterclaims between them the details of which need not be gone over here, and on January 7, 1915, defendant wrote Whittemore demanding the money he had sold the hogs for, concluding:

"Now, if you want to save trouble you had better attend the same."

On January 27, 1915, Walter, having obtained from the prosecuting attorney of Saginaw county an order for a warrant, swore to a complaint before a justice of the peace of said county charging Whittemore with having in December, 1914, sold five hogs of the value of \$66.95 covered by a chattel mortgage given by him to complainant, "fraudulently disposing of the same, with intent to injure and defraud the said Lewis Walter out of the value of the same within the meaning of section 11619, 3 Comp. Laws (3 Comp. Laws 1915, § 15383)," etc. On this complaint a criminal warrant was placed in the hands of the sheriff of Saginaw county, who went to the Hoffman farm and arrested Whittemore, taking him to Saginaw, where he was detained in jail for a short time. From the jail he communicated with counsel over the phone and arranged for bail, after which he was taken before the justice and released on bail in the sum of \$1,000 for his subsequent appearance, on February 4, 1915; Hoffman, who was owner of the farm and supervisor of the township where it was located, going upon his bond.

At this time all the property covered by the chattel mortgage except the five hogs was on the farm where Whittemore resided, none of the notes given by him

for deferred payments were due, and the \$41.25 for which he claimed an agreed credit should have been indorsed on the first note given amounted to more than he had received for his half of the hogs sold. On February 4, 1915, the day set for examination, the prosecuting attorney of Saginaw county directed that said case be nolle prossed, and plaintiff was thereupon discharged from custody without preliminary examination or trial.

Defendant's various assignments of error include refusal of the court to direct a verdict for the defense, numerous alleged errors in the admission and rejection of testimony, denial of certain requests to charge, and erroneous instructions in the charge as given.

Early in his charge the court concisely advised the jury that to recover plaintiff must establish by a preponderance of evidence:

"First. That the prosecution was begun and came to a legal termination in plaintiff's favor.

"Second. That defendant instituted the prosecution without probable cause.

"Third. That in doing it, he was actuated by malicious motives."

The first proposition was undisputed, and the remaining two involved the issues of fact for their consideration. These propositions were plainly repeated and elaborated in subsequent portions of the charge directing the attention of the jury to and emphasizing just what questions were for them to decide.

It is strenuously contended that defendant acted in good faith under advice of the prosecuting attorney after laying the facts of the case before him and the court committed reversible error in not giving the following request:

"In placing the facts before the prosecuting attorney for his action and advice, Lewis Walter was not required to be the judge of what was material and

necessary to be stated and was required only to state the case as he fairly understood it, and if he did this and fairly and truthfully answered the questions asked by the prosecuting attorney, and then took such course in the matter as the prosecuting attorney advised, then defendant was not guilty of malicious prosecution."

Defendant's testimony on direct examination was, in outline, that he truthfully stated the facts of the case to the prosecutor, answered all questions asked, and submitted the matter to him; that the prosecutor whose directions he followed gave him an order for a warrant; that when he made the complaint he honestly believed Whittemore had committed the offense charged, had no intent to hurt him, and only wanted the "security left good," later consenting to let it drop when told by the prosecuting attorney Whittemore admitted he had no right to sell the property, and would not sell any more. On cross-examination he admitted that he did not disclose to the prosecuting attorney their differences touching the amount of hay, ensilage, etc., the large hog, the warranty of the horses, the \$41.25 or other matters under which Whittemore claimed the right to sell the five hogs and retain the proceeds. Of this interview and advice given by him the prosecuting attorney testified, amongst other things:

"I asked him whether there had been any deals or arrangements between them so that their relations had been changed at all from what it was when the chattel mortgage was made out, and he said there had not been; the chattel mortgage was still in effect as it was.
* * * And I stated to Mr. Walter that if what he had told me was the fact, that these hogs were covered by this chattel mortgage, and this man had sold them without permission and had kept the money, that that was an offense under the law, and that I would give him an order for a warrant under that statement of facts, and I wrote out the order there on the table and handed it to Mr. Walter and told him where the justice's court was."

Upon this branch of the case the court told the jury, in part:

"You have heard the version of that conversation given by the defendant and by the prosecuting attorney. That was given for two purposes: For the purpose of showing whether the defendant at the time he made the complaint was actuated by malice; and whether or not he was governed in the matter entirely by the advice and counsel of the prosecuting attorney. So in this case I charge you that the advice of counsel followed in good faith after a full and fair statement of all the material facts in the case is a defense to an action for malicious prosecution, though the facts as stated to counsel do not justify the advice given. * * * If you find in this case that the defendant went to the prosecuting attorney of Saginaw county, and made a full and fair statement of all the material facts in the case, and the prosecuting attorney advised him that he had a right to make a complaint against the plaintiff here for disposing of chattel mortgage property, under the statute, and plaintiff (defendant) in good faith followed that advice and counsel, then that would be an absolute defense, but if you should find in this case that the defendant did not make a full and fair statement of all the material facts in the case to the prosecuting attorney, then that would not be a defense."

We think the subject was fairly and sufficiently covered by the general charge. *Peterson v. Toner*, 80 Mich. 350 (45 N. W. 346); *Webster v. Fowler*, 89 Mich. 303 (50 N. W. 1074); *Harris v. Woodford*, 98 Mich. 147 (57 N. W. 96).

Several of defendant's assignments of error relate to a line of testimony admitted in which Whittemore and his wife testified to an understanding and agreement between the parties prior to and at the time of the execution of the chattel mortgage that the hogs could be sold by Whittemore whenever fattened and in proper condition for market. All such testimony was earnestly objected to as in violation of the pri-

mary rule that parol evidence is not admissible to vary the plain provisions of a written instrument. In offering this evidence plaintiff's counsel admitted its incompetency to vary the terms of the chattel mortgage, and expressly stated its purpose was to negative criminal intent or purpose on the part of Whittemore to injure or defraud defendant. The court admitted it for that purpose, and instructed the jury in relation to it:

"If he had wanted to dispose of any of the property, it was his legal duty to have obtained the written consent of the defendant in this case; but you remember that in this case there was some evidence given upon the part of the plaintiff and his wife of some talk about disposing of the property previous to the signing of the contract. That evidence was not permitted for the purpose of showing that the plaintiff here had the right to dispose of the property, but for the purpose of showing the understanding of the persons at the time. If the plaintiff in this case, at that time, after he had signed that, honestly believed that he had the right to dispose of those hogs without the written consent of the defendant, then, if he disposed of them, he would not be guilty of having fraudulently disposed of them."

It is an elementary rule that evidence competent for one purpose and incompetent for another should be admitted and in jury cases instruction given in what manner, to what extent, and for what purpose only it may be taken into consideration. The bare fact that plaintiff sold the five hogs covered by the mortgage as shown and admitted, while perhaps raising a presumption, was by no means conclusive of his guilt. The criminal gist of the offense was that in doing so he intended to injure or defraud defendant. Even if this testimony by plaintiff were incompetent, defendant's own testimony on the same subject would tend to relieve its admission of serious importance, for he testified also to an understanding that plaintiff "was to have the right to sell the stuff that was there, that

was covered, when it was fit for sale * * * if it was applied upon the mortgage," and later, after testifying that nothing was said about the hogs, in reply to the question,

"Q. It was your idea, if he sold these hogs or any other property like that, I don't mean tools, but I mean the hogs and the calves, if they were fit for market, that he would have the right to sell them providing he would come and bring the money and apply it on the notes,"

answered, "The hogs is all." His indicated grievance appears to have been not that plaintiff sold the five hogs, but that the proceeds from their sale were not applied upon the mortgage, while Whittemore's claim is that such application was, in effect, made under their agreement that in lieu of the same the \$41.25 due him from defendant should be credited on the first of the notes which the mortgage secured, which defendant denied. This presented a material and important issue of fact.

If plaintiff's claim was false, the jury might well find that there was probable cause to believe that he sold these hogs covered by the mortgage and kept the proceeds with a fraudulent intent under the statute to injure and defraud defendant, fully justifying the latter in swearing out a criminal warrant against him, while, if it was true, they could with propriety find that no reasonable grounds existed for such belief, and defendant was moved to such course by some ulterior motive, actuated only by ill will or malice. With such a material issue of fact presented by the testimony it seems unnecessary to further discuss the contention that a verdict should have been directed for defendant.

We find no reversible error in the admission or rejection of testimony upon the issues of this case as outlined by the record, from which the pleadings have been omitted, and are led to the conclusion that the

court in a fair and logical charge clearly explained to the jury the well-settled principles of law applicable to the controversy, and plainly directed their attention to the material questions of fact submitted for their determination, with alternate rulings adapted to their permissible action in deciding the disputed facts.

We find no reason for disturbing the result, and the judgment will stand affirmed.

STONE, C. J., and KUHN, OSTRANDER, BIRD, MOORE, BROOKE, and PERSON, JJ., concurred.

TRAVELERS' INDEMNITY CO. v. DETROIT UNITED
RAILWAY.

1. STREET RAILWAYS—CROSSING ACCIDENT—AUTOMOBILES.

Where the driver of an automobile testified that he started to cross defendant's street car track three or four hundred feet ahead of a street car, believing that he had ample time in which to cross, and the motorman disputed the statement, there was evidence to take the case to the jury, and the trial court properly declined to direct a verdict for claimed contributory negligence of the driver.

2. SAME—NEGLIGENCE—DUE CARE.

The chauffeur was entitled to assume that the motorman would observe reasonable vigilance according to conditions, and it was his duty to have the car under such control as to admit of stopping it as soon as he could discern objects on the track.

3. SAME—COLLISIONS.

Mutual care to avoid collisions is demanded and to be expected; and both parties on a busy street in a city were entitled to use their own method of travel and required to avoid accidents by the use of all reasonable precaution.

4. SAME—WITNESSES—EVIDENCE.

A witness who had formerly been in defendant's employ as a conductor and run cars for nine or ten years, being familiar with the method of operating them and stopping cars under disadvantageous conditions, was qualified to express an opinion on the subject by hypothetical question and answer.

Error to Wayne; Mandell, J. Submitted June 7, 1916. (Docket No. 30.) Decided September 27, 1916.

Case by Travelers' Indemnity Company, as assignee of one Gustav W. Zanger, against the Detroit United Railway for damages done to the automobile of plaintiff's assignor. Judgment for plaintiff. Defendant brings error. Affirmed.

Corliss, Leete & Moody (Wm. G. Fitzpatrick, of counsel), for appellant.

Fred L. Vandever and Orville H. Foster, Jr., for appellee.

STEERE, J. In this action, begun in justice's court, and on appeal retried in the circuit court of Wayne county, plaintiff recovered a verdict and judgment of \$200 for damages done to an automobile belonging to one Zanger, plaintiff's assignor, when struck by one of defendant's south-bound street cars on Broadway, in the city of Detroit, between east Grand River and Gratiot avenues, in the early evening of January 12, 1913.

The assignments of error upon which defendant relies are refusal of the court to direct a verdict in its favor because of contributory negligence, submitting the case to the jury under a charge which permitted them to find the street car was negligently operated, and admitting testimony of a witness named Fish as to the distance in which the street car could be stopped.

No testimony was introduced by defendant. Plaintiff's testimony showed that the injured automobile belonged to Zanger and was being driven by his chauffeur, who had come to take him home from his place of business at 36 Broadway, east side, and, finding no parking room upon that side, was crossing the street, along which defendant's double tracks extended, to the opposite side, where he could find room to wait until Zanger came out to go home. It had been raining and the evening was misty, with the light fading at that time.

Ochs, the chauffeur, testified that he then had his lights lit and drove slowly north down the east side looking for a place to park, and, finding it necessary to cross over on account of cars being parked all along that side, watched his chance until he saw a south-bound street car pass, and, observing the next was coming south about a block and a half away, 300 or 400 feet beyond the first street north, and thinking he had plenty of time to get over, turned his automobile to the left to cross, driving slowly upon first speed, and just as he was about to cross the west track on which south-bound cars run this street car from the north struck his left rear wheel, violently throwing him around into another automobile, resulting in serious damage to the one he was driving, which he described in detail.

A witness named Kays, a draughtsman in the employ of the Edison Illuminating Company, with offices farther north on Broadway, testified that he was then on his way home and saw the accident. The first thing he remembered in that connection was noticing the chauffeur of the automobile, which was either stopped or running very slowly, approaching the car tracks, "look north and south on Broadway, and then start to cross the track." This witness also stated that there was then a trolley car coming "within about 40 or 50

feet or more than that," but subsequently explained that he was on the sidewalk just to the north of where the accident occurred, going south with his back towards the approaching trolley car, and first saw it when the front end got opposite where he was and within about 6 or 8 feet of the automobile; that he did not take notice of what the motorman was doing before the accident or until he stopped his car, which ran between 90 and 100 feet after striking the automobile, but he was familiar with the noise cars make in stopping—the grinding of the brakes, etc.—and heard no such noise previous to the time the street car struck the automobile; that he would judge the street car was going at least 15 miles an hour when the accident occurred.

The chauffeur's negligence was clearly a question for the jury. He testified that he was looking for a chance to cross, and availed himself of a time when there was no approaching car within the block, near the center of which he crossed; that he saw the car, which hit his left hind wheel, when it was 300 or 400 feet beyond the first street north, and thought he had plenty of time to get over ahead of it, while Kays, whose back was towards the approaching car, confirms his claim that he took note of the situation and looked both ways as the automobile was about to cross the tracks. This is not a case of failing to look and see the approaching car, but of reasonable judgment and prudence in attempting to cross after seeing it. If it was reasonable for him to believe he could cross safely, he was not negligent in attempting it. Provided the car was as far away as he testified, it would have to travel at an unusual rate of speed to catch him, and in forming a judgment he had a right to assume that a reasonable degree of care according to conditions would be observed by the motorman also. If by reason of the misty evening and fading light it was more

difficult for the motorman to observe clearly plaintiff's position and readily discover whether or not he had cleared the track, it was his duty "to have the car under such control as to admit of its being stopped after he became able to discern objects on the track, and before a collision with such objects should occur." *La Pontney v. Cartage Co.*, 116 Mich. 514 (74 N. W. 712).

Mutual care to avoid collisions was demanded and to be expected. Both parties were driving on a business street in a large city, which both had a right to use for their particular method of travel, but each in driving his conveyance was required to exercise all reasonable care and take precautions to avoid injuring others. Their duties were mutual. The questions of negligence and contributory negligence were questions of fact, properly left to the jury within the rule of the following cases: *Garrity v. Railway Co.*, 112 Mich. 369 (70 N. W. 1018, 37 L. R. A. 529); *Ryan v. Railway Co.*, 123 Mich. 597 (82 N. W. 278); *Moran v. Railway*, 124 Mich. 582 (83 N. W. 606); *Chauvin v. Railway*, 135 Mich. 85 (97 N. W. 160); *Gaffka v. Railway*, 143 Mich. 456 (106 N. W. 1121); *La Londe v. Traction Co.*, 145 Mich. 77 (108 N. W. 365); *McQuisten v. Railway Co.*, 147 Mich. 67 (110 N. W. 118); *Deitsch v. Traction Co.*, 155 Mich. 15 (118 N. W. 489); *Clark v. Traction Co.*, 167 Mich. 694 (133 N. W. 927).

It is urged that testimony of the witness Fish as to the distance in which such a car might be stopped was inadmissible because the hypothetical question asked him did not contain sufficient controlling conditions, nor was there evidence as to the actual rate of speed of the trolley car which struck the automobile, and the witness did not properly qualify as an expert, never having worked as a motorman or operated a car. He had formerly been in defendant's employ as a conductor, for nine or ten years, and ran as such on cars

of the type of this one. He testified that in such capacity he was familiar by observation with the method of operating them, and had seen them make stops on rainy days when the tracks were wet, and had knowledge of the distance in which trolley cars could be stopped, and at the speed the witness Kays testified this car, as described, was running—about 15 miles an hour or a little more—it could be stopped in from 50 to 70 feet on a wet or drizzly day.

We think the witness sufficiently qualified as having especial experience and knowledge entitling him to give opinion testimony on the facts stated in the hypothetical question asked, and that sufficient material facts based on the evidence were embodied in the question to render it permissible. His answer was admissible for the jury to give such weight as they deemed it entitled to.

Finding no reversible error in this record, the judgment stands affirmed.

STONE, C. J., and KUHN, OSTRANDER, BIRD, MOORE, BROOKE, and PERSON, JJ., concurred.

DE HOOP v. PENINSULAR LIFE INSURANCE CO.

1. SALES—STOCK—CORPORATIONS—AGENCY.

Evidence, in a suit for the amount paid upon a sale or subscription of corporate stock which was converted to the use of the defendant's agent, who solicited the subscription, defendant refusing to issue the stock or refund the payment, and claiming that before the stock was subscribed for it withdrew the same from the market, that the

agent's authority terminated with the taking effect of the "blue sky law," and that the plaintiff was estopped by delay in presenting the certificate, *held*, to present an issue for the jury whether the letter terminating the agent's authority was ever delivered, and as to the estoppel charged.

2. SAME—ESTOPPEL—RATIFICATION—SALE OF STOCK.

The trial court did not err in declining to direct a verdict for the defendant on the ground that the so-called "blue sky law," Act No. 143, Pub. Acts 1913, required the agent to register, and he failed to comply with it, since he was a *de facto* agent and the sale was not unlawful as to a corporation which had accepted the benefits of the transaction; especially in view of the cases holding the act of 1913 unconstitutional.

Error to Ottawa; Brown, J., presiding. Submitted June 23, 1916. (Docket No. 112.) Decided September 27, 1916.

Assumpsit by George De Hoop against the Peninsular Life Insurance Company for the recovery of money paid for stock in defendant corporation which was never delivered to plaintiff. Judgment for plaintiff. Defendant brings error. Affirmed.

Walters & Hicks, for appellant.

Louis H. Osterhous, for appellee.

STEERE, J. Plaintiff recovered a verdict and judgment against defendant in the circuit court of Ottawa county for \$750 (with interest), being the amount which he had paid on January 22, 1914, to F. E. Brown, a former stock salesman and insurance solicitor of defendant, for ten shares of its capital stock.

Plaintiff was a farmer living in the township of Zeeland, in said county, where Brown called and first solicited him to buy some stock in the Peninsular Life Insurance Company, defendant, during the summer of

1913. Brown then was, and had been since January, 1909, agent of defendant, authorized to sell its stock. Plaintiff did not then yield to the solicitation, but was apparently a promising prospect, and Brown's efforts were ultimately successful, the deal for the shares of stock at \$75 per share being finally consummated on the date stated, at which time plaintiff paid the \$750 to Brown, by check, signing one of defendant's forms of application for stock with which Brown was supplied, a duplicate of which was given him by Brown, signed by himself as agent. The check given in payment, drawn on the Zeeland State Bank, was later cashed by Brown and charged up to plaintiff.

Brown had sold 10 shares of defendant's stock to an acquaintance of plaintiff named Haitsema, living in the same township, having first solicited him in March, 1912, but finally closed the deal with him in December, 1913, giving him a countersigned duplicate of his application, as he did to plaintiff, telling him it would be some months before the stock could be issued, but the application was just as good as the certificate of stock, as he could hold it a year and then get his money back with six per cent. if he wished to, requesting him to so advise plaintiff, which was done. Brown subsequently became a defaulter and absconded.

Defendant thereafter refused to recognize the transaction, either by issuing the stock or refunding the money plaintiff had paid Brown for it, denying that Brown was then its agent, and this action was brought to recover the amount so paid.

Plaintiff declared upon the common counts in assumpsit, with an added count outlining the circumstances of his purchase of the stock, including his demands and defendant's refusal.

Defendant pleaded the general issue with special notice that when the so-called blue sky law of 1913

went into effect, on September 10th of that year, defendant withdrew its treasury stock from sale, "and thereafter did not at any time authorize any dealer, and especially F. E. Brown, to sell or offer for sale any of its said treasury stock, or to receive or accept subscriptions therefor from the said plaintiff or any other person," etc., and as a further matter of defense, without waiving the preceding, that plaintiff did not in any manner notify defendant he had paid or applied for any of its stock until January 15, 1915, prior to which time "said F. E. Brown had ceased to be an employee of defendant company for any purpose whatsoever, and had become a fugitive from justice, and this defendant after diligent inquiry and investigation, has been unable to ascertain his whereabouts." By reason whereof it is asserted plaintiff became estopped from maintaining this action.

Upon the trial it was shown conclusively by admissions of defendant's president and its records that Brown was in defendant's employ as its authorized agent, with power to sell its stock, from January, 1909, until some time in October, 1913, and from February 22, 1914, to about January 4, 1915, when he absconded, but it is claimed that on account of the blue sky law going into effect at about that time his authority was revoked, in October, 1913, by a letter from the president telling him to sell no more stock until further notice, and he was not authorized to again act as its agent until some time after the sale in question was made.

Under the contention that a verdict should have been directed in its favor, defendant's counsel only pointed out in their brief assignments of error 3 and 4 as those urged and relied upon, which involve the two questions:

"First. Was Brown the agent of the defendant for the purpose of selling stock, at any time between ap-

proximately the middle of October, 1913, and approximately the 20th of February, 1914?

"*Second.* Was the agency of Brown terminated, as a matter of law, by the going into effect, on or about the 10th day of September, A. D. 1913, of Act 143 of the Public Acts of Michigan of 1913—the Blue Sky Law, so called?"

From the undisputed evidence in this case it appears that the Peninsular Life Insurance Company, defendant, was planned, promoted, and organized by John C. Robinson, who became its president and general manager. He testified that after several years' experience as agent selling insurance for various companies he conceived the idea of himself forming an insurance company, and this company was the result. He organized it in 1908 with an authorized capital of \$150,000, divided into 3,000 shares with a par valuation of \$50 each. At the first meeting of the organizers he got together 13 members, including himself, 40 or 50 shares of stock then having been subscribed for, and he was authorized to sell the remainder of the stock under some contract arrangement with the company, or its members. As it was necessary to deposit \$100,000 in cash or bonds with the State insurance department before the company could engage in the business for which it was organized, Robinson's efforts were first directed to selling sufficient stock to raise that amount, which took towards three years, but was finally accomplished, when the company qualified and was licensed to engage in the business of writing insurance some time during April, 1911. In January, 1909, Robinson employed Brown, whom he had previously known as engaged in the life insurance business, to sell stock for the company. From that time until he took his permanent vacation in January, 1915, about six years later, Brown was steadily in defendant's employ, with headquarters in

Grand Rapids, working that territory as its agent, authorized to sell its stock and solicit insurance for it, one or both, without possible question except as to the interim "between approximately the middle of October, 1913, and approximately the 20th of February, 1914," during which time it is claimed his authority to sell stock was suspended.

The matter of Brown's delinquencies was apparently carried beyond his power to cover them, and resulted in his absconding when plaintiff and Haitsema endeavored to secure their stock or return of their money, at the end of the year after they had paid, through their local bank. Robinson then visited Grand Rapids and Zeeland, trying to find Brown, and while there interviewed them. They both testify that he then told them Brown had authority to sell the company's stock up to May 14th, and Haitsema testified Robinson explained that the stock was then taken away from him because the company was doing a good business and the stock would sell itself. This Robinson does not deny, but stated that he did not remember so telling them. He testified:

"Our talk principally was the fact that they bought the stock a long time before, and I knew nothing at all about it until they wrote that week, and what could be done I could not tell them about it. * * *

"Q. Then your complaint to them was that you had never received the money or the application from Brown, and that they had delayed for a long time in advising the company of the fact of their purchase?

"A. Yes.

"Q. And there is nothing further that you said to them in regard to it that you remember?

"A. No; not that I remember."

He apparently at that time was urging that they were guilty of laches, which later took form in defendant's plea of estoppel, and which manifestly is not a tenable issue under the facts in this case. If

Brown was not defendant's agent at the time he sold this stock no question of estoppel is involved, and if he was its agent with authority to make the sale, plaintiff had performed on his part, and defendant had not. Within the statute of limitations no estoppel could arise in its favor by reason of it having defaulted in its obligations. Defendant's counsel do not now so contend, and the only significance of that part of the interview is that, if Brown was not defendant's agent when he sold the stock, its president, when talking to those men about the agency, apparently never thought of that. He was the man who best knew and would naturally have the facts within the field of consciousness; for under a contract with defendant of April 10, 1911, authorized by its directors, running for 12 years, he was engaged as its general manager with "general supervision and direction of all the affairs of said company, subject to the direction of the executive committee, to act as director of agencies of said company, with power to employ such managers of agents and such other agents as he shall deem best, and to remove them at will."

Robinson, however, testified that while in the Battle Creek Sanitorium as a patient in the fall of 1913 he was advised by defendant's secretary, Englehart, that application had been made by defendant to the State securities commission in compliance with the then coming into effect blue sky law, and the necessities in that connection, following which he wrote, while lying in bed, a letter to Brown, some time between September 29th and October 13th, telling him not to sell any more stock until further orders from the writer. No copy of this letter was kept, and the original could not be produced. He therefore was permitted to give oral testimony as to having written it and its contents.

At a meeting of the directors on January 27, 1914, in a discussion touching proposed sales of the com-

pany's stock, Robinson stated that Brown had sold about 80 per cent. of all stock sold up to that time, and he thought him capable of disposing of the balance on the basis of a 10 per cent. commission. He then had in his possession and exhibited to the board applications for stock recently received from Brown, amongst which was one taken on the same date as that of plaintiff, and one on the day following, for both of which stock was issued. Englehart, the secretary, who served as such from August, 1913, to April, 1914, testified that the company had in its treasury about 777 shares of unsold stock, and up to about January or February, 1914, was desirous of selling stock, the disposition of which was entirely in Robinson's hands; that Brown was defendant's agent, selling stock and writing insurance, and witness did not know of his authority to sell stock being cut off, the general conversation and understanding being that after a license had been secured under the blue sky law from the State securities commission Brown, to whom no license was directly issued as selling agent, would have the selling of stock in Robinson's name.

Without further detailing what witnesses testify to and defendant's records show, we are well satisfied from this record, taken as a whole, that there was ample testimony to carry the question of Brown's agency during the time in question to the jury, and to clearly raise an issue of fact as to whether the claimed letter from Battle Creek, if written, was ever received by Brown. Aside from Robinson's oral testimony to the contrary, the evidence, both oral and written, is persuasive that for several years, including the time in question, Brown was defendant's well-known and recognized agent, authorized to sell its stock and solicit insurance for it, equipped with its blanks and forms of application for purchase, which were never recalled, and within the scope of such agency authorized to act

for and bind his principal. The trial court under a fair and well-guarded charge submitted the single question of Brown's agency, or authority to act, to the jury.

It is further urged, however, that, irrespective of what issues it might otherwise be permissible to submit to the jury, the court should have directed a verdict for defendant because it appeared without dispute that Brown was never licensed by the securities commission to sell stock, and his agency terminated by operation of law on taking effect of the blue sky law on September 10, 1913, which prohibited defendant from selling or offering its stock for sale until 30 days after it had filed the necessary documents required by the act, and required all its authorized agents to be licensed and registered with the commission, citing ample authority upon the unquestioned proposition that an agency may be, and usually is, terminated "by a change of the law which would render performance of the contract illegal."

The blue sky law of 1913 had a comparatively short and somewhat checkered career, having been held unconstitutional by the United States District Court (*Alabama, etc., Transportation Co. v. Doyle* [D. C.], 210 Fed. 173), and repealed at the next legislative session (1915), in view of which a case then pending in this court attacking the constitutionality of the act was dismissed, for the reason that the issues there raised had become moot questions. *Howe v. Doyle*, 187 Mich. 655 (154 N. W. 62).

We are not impressed that the ghost of that act yet walks in aid of those who seek to benefit by their failure to observe it when ostensibly in being, whether constitutional or not. Under that act, defendant had filed its application with the State securities commission, on September 18, 1913, which was approved and a license to sell stock issued on October 15, 1913.

Robinson returned from Battle Creek during October, and made a trip to the upper peninsula to sell stock and work up business for the company. It was not illegal under that act for defendant to sell its stock nor for plaintiff to buy. The act in one section required investment companies to register their agents, and in another provided agents should not act as such until their names and addresses are registered. This defendant failed to do as to Brown, on the theory, as its secretary testified, that Brown "would have the selling of the stock in Mr. Robinson's name," but if, as the jury found, he did in fact, act in the matter as defendant's representative, authorized and recognized by it to act as such, he was, as between the parties directly interested, its *de facto* agent, dealing for defendant with an innocent party. It was lawful for defendant to sell its stock, and certainly for plaintiff, who knew of no irregularities on defendant's part in making the sale, to buy it.

This action, however, is not for the stock, but for money had and received for defendant by its authorized representative. We think the principle which should be applied to that question in this case is well settled in *People v. Hawkins*, 106 Mich. 479 (64 N. W. 736), a criminal case where, in defense of a charge of embezzling money collected by him as agent, Hawkins contended that the corporation for which he collected the money was doing business in this State illegally by reason of noncompliance with statutory requirements relative to foreign corporations, and therefore all contracts made by it were void. Speaking through Justice HOOKER, this court there said:

"But, if it should be held that the act under consideration was prohibitive, and that the company could not make or enforce contracts, it would not follow that this defendant could not be guilty of embezzlement. In fact, he was the agent of the company,

whether it was a lawful enterprise or engagement or not. By virtue of his relation, he became possessed of property which was not his, and which belonged to the company if to anybody. He acted for, and permitted himself to be held out as the agent of, the company, and received money from various persons who were willing to pay. He was a *de facto* servant, and it is unnecessary that his relation should have grown out of a lawful * * * agency. It was enough if he acted, and was permitted to act, as such."

Merely private interests are involved here. No rule of public policy suggests that the courts should by any narrow or technical construction find this undertaking illegal as a defense to an action to recover moneys from the party by whom, through its *de facto* agent, they were received, and we think the court properly submitted to the jury as a question of fact whether or not they were so received.

The judgment is affirmed.

STONE, C. J., and KUHN, OSTRANDER, BIRD, MOORE, BROOKE, and PERSON, JJ., concurred.

TUTTLE v. DETROIT, JACKSON & CHICAGO RAILWAY CO.

1. STREET RAILWAYS — EVIDENCE — ADMISSIONS — INCONSISTENT CLAIMS.

Where plaintiff claimed, in a personal injury claim, that he was thrown to the ground by the starting of defendant's car as he was in the act of alighting, and his testimony was disputed by evidence of his admissions, and by his assertions on cross-examination, inconsistent with his claims on direct examination, it was proper to leave to

the jury his claim that the car started quickly and unexpectedly while he was descending from the step.

2. SAME—BURDEN OF PROOF—QUESTION OF FACT.

It was a question of fact for the jury to determine the matter of plaintiff's credibility; the burden resting on him to establish his freedom from contributory negligence did not change the rule.

3. SAME—NEGLIGENCE.

Passengers are entitled to a reasonable time in which to get off after the car has stopped; the duty of the carrier is not discharged until the passenger, alighting with reasonable expedition and exercising due care, with sufficient time to exercise it, is free from the car.

4. SAME.

Held, that the questions of negligence and contributory negligence were properly submitted to the jury and the verdict was not excessive.

Error to Washtenaw; Kinne, J. Submitted June 6, 1916. (Docket No. 5.) Decided September 27, 1916.

Case by William Tuttle against the Detroit, Jackson & Chicago Railway Company for personal injuries. Judgment for plaintiff. Defendant brings error. Affirmed.

Cavanaugh & Burke, for appellant.

John Kalmbach and Arthur Brown, for appellee.

STEEER, J. In this action plaintiff recovered a verdict and judgment against defendant of \$300 for injuries sustained while alighting from one of its inter-urban cars on September 18, 1912, at the so-called Cooper crossing, a farm stop near plaintiff's place of residence, 1½ miles easterly from the village of Chelsea, in Washtenaw county.

The negligence charged against defendant in plaintiff's declaration, and upon which the case was submitted to the jury, is, briefly, that after defendant's

car upon which plaintiff was a passenger came to a stop at Cooper's crossing to allow him to alight, and just as he was in the act of stepping down from the rear platform in the act of alighting, exercising due care on his part, defendant suddenly and without warning started the car forward, causing him to lose his balance, throwing him violently to the ground upon his face, and seriously injuring him.

No evidence was introduced upon the trial by defendant, but at the conclusion of plaintiff's testimony its counsel moved for a directed verdict of no cause of action upon the following grounds:

"(1) Because the said plaintiff was guilty of contributory negligence.

"(2) Because from the testimony of the plaintiff he jumped off the car while the said car was in motion.

"(3) Because the declaration alleges the cause of the accident to be that the car suddenly started while plaintiff was in the act of stepping off, causing him to lose his balance, whereas the proof on the part of the plaintiff shows that after the car had started plaintiff jumped off while said car was in motion.

"(4) Because there is a material variance between the allegations of the declaration and the proofs of the plaintiff as to the manner in which the accident occurred."

This motion being denied, substantially the same propositions were embodied in requests to charge, and later in a motion for a new trial, with the added reason that the verdict was against the weight of evidence. Proper steps were seasonably taken to save all adverse rulings for review.

The essence of defendant's contention, as we understand it, is that no other witness saw plaintiff at the exact time he parted company with the car, and he, as the sole witness to the manner of his alighting, not only stated both in and out of court that he jumped from the car while it was in motion, thereby admit-

ting negligence on his own part, but his conflicting and inconsistent account of how it happened, taken in its entirety, failed to sustain with any legal evidential force against his own contradictions, the burden of proof resting upon him to make out a *prima facie* case of his freedom from contributory negligence and actionable negligence on the part of defendant in the particulars charged in his declaration.

Plaintiff was a farmer 58 years of age, and had been engaged in farmwork during the day in question. In the evening after his day's work was done he went to Chelsea on an electric car of defendant's which passed his place about 7:25 p. m. His son Clare, a young man about 25 years old, who had worked with him during the day, also went to Chelsea that evening, but not on the same car. They met at the waiting room in Chelsea, and returned together on the same car, leaving there shortly after 10 p. m. Plaintiff was carrying a loaf of bread he had purchased, and sat down inside the car, near the center, and paid his fare to the conductor before reaching Cooper crossing. His son rode on the rear platform. Another young man named Weisman was also a passenger for Cooper crossing. The car slowed down as it approached the crossing, and, as all three testified, came to a brief stop, when they quickly got off, and it immediately started on. In alighting plaintiff fell and was injured, seriously and permanently as he claimed; and his physician was of the same opinion. The nature and extent of his injuries, however, which is questioned by defendant, would be in any event an issue of fact calling for no discussion here.

Weisman rode in the forward part of the car and left it at the front. Plaintiff sat centrally or further back in the car, and his son rode on the rear platform. They got off at the rear. The son was ahead, and

could, or did, not see whether his father stepped, or jumped, or was thrown from the car.

Plaintiff's most connected account of the accident, given on direct examination, is as follows:

"When the car commenced to slack down, I got up out of my seat and went out the door and started down the steps. My son went down right ahead of me. The car stopped. My son had just stepped off when it stopped. He stood right down on the last step, and when the car stopped he stepped right off, and I had a loaf of bread under this arm, and took this loaf of bread and changed it to the other arm, and was just going to get hold of this rod, and I was going to follow, and the car started. I couldn't tell how I got off, or what. The next thing I knew the boy was holding me up and I was in that hole. Just how I left the car or struck the ground I never could tell. I lost my head or something. I was just going to make that hole or to jump over it. I couldn't tell whether I got that rod. I was just going to get hold of it. I missed it. I don't remember Mr. Weisman being there at all."

It appeared that some time after the accident plaintiff went to consult an attorney he knew, to whom he states he had gone before "more or less in anything like that," but the attorney told him he was professionally connected with defendant, and gave him the address of its claim agent with the suggestion that he communicate with him. This plaintiff did by mail, in a somewhat rambling letter telling of his claim and sufferings, the cause of which he outlines in part as follows:

"The conductor didn't give me time to get off before starting the car. It was a dark, rainy night, and they was past the crossing, and I jumped in a hole, and was hit by the car, and haven't been able to do a day's work since."

He also, when in Detroit, went to see defendant's claim adjuster, and signed a statement written out by

a young man, who testified he was then claim adjuster for the Detroit United Railways, and obtained the information contained in the statement entirely from plaintiff as he told his story "exactly, word for word," and that plaintiff read it before signing. It concludes:

"I have read over the above and same is correct. I think that step of car hit my chest."

The portion of this statement which it is urged particularly negatives his testimony on the trial, and shows admitted contributory negligence is as follows:

"Upon approaching that point I left my seat in car, and started for rear platform. My boy, Clare Tuttle, was with me at the time, and he was ahead of me, and was on step of car. Upon reaching the crossing he alighted while car was still in motion, and I started down step with intention of getting off, and as I started down steps I noticed that car was again starting to pick up speed, and upon noticing that I hurried myself and jumped off, whilst car was going. I think I could have safely jumped off if it hadn't been for a hole alongside track which I fell into."

Plaintiff admitted that he signed the statement which the agent wrote out and tried to read it over, but claimed he could not do so very well, because he did not have his glasses; insisted that he did not make certain statements appearing in it, and that he told the story in substance, "but not in the same words," as he told it on the stand, as near as he "possibly could"; denied he stated that his son got off before the car stopped, or that he positively stated he jumped, or that he did in fact jump, unless as he fell; that he knew he was going to "get hold of that rod and jump off," but "couldn't say what I did."

It may be conceded without going into further details that plaintiff in the course of a rather pressing cross-examination made conflicting assertions and de-

nials difficult to reconcile, and inconsistent with his at other times claimed lack of memory and confusion as the result of his fall, but we cannot find that this carries his testimony beyond the well-settled rule that the credibility of a witness and consistency of his statements are matters for the jury rather than for the court.

Although they did not see him at the exact time he left the car, the testimony of his son and Weisman is competent to consider for its bearing upon plaintiff's insistent assertion of the essential facts that the car had stopped and started up again before he had time to get clear off it in alighting; for the testimony of each witness is to be weighed in connection with that of others and in the light of all facts and circumstances found proven in the case.

His son Clare, who rode upon the rear platform, testified that as the car slowed down for the crossing he saw his father near the rear door; that he stepped "quite fast like to get off the car, and must have been very close behind," but just where he could not swear, as he went ahead and stood on the last step waiting for the car to stop, which it did with the rear opposite a hole, or ditch, across which he stepped; that the "car barely came to a stop and went right on," and as he balanced, and squared himself on his feet, after stepping across, "ready to look around," he saw his father "in that hole on his face in a frog position," apparently unconscious; that as he proceeded to care for him Weisman came up from where he got off forward and helped him, and after his father came to he (Clare) assisted him home alone.

Weisman, who was riding near the front of the car, testified that as it approached the crossing he went out forward, and stood on the bottom step until it stopped, about a length past the crossing, when he stepped off; that it just stopped and went right on

again, "couldn't have remained standing over a jiffy," and he heard no signal for it to start; that it was a dark, cloudy night, and he "kind of heard some one groaning," and went back about the length of the car where he found Mr. Tuttle "in the hole" with his son lifting him up and he helped a little, amongst other things picking up plaintiff's hat and putting it on his head and giving the loaf of bread to his son; that while unable to say whether or not plaintiff was unconscious "he did not say anything to me when I raised him up."

That the car halted at this crossing to discharge passengers, and plaintiff, who had paid his fare to that point, was in the act of getting off when he fell, is undisputed. Whether it had stopped and quickly started up while he was in the act of alighting was, we think, fairly a question for the jury under the testimony in this case.

That passengers are entitled at a stopping place to a reasonable time in which to get off after the car has stopped and the duty of the carrier is not discharged until the passenger, alighting with reasonable expedition and exercising due care, with given time to exercise it, is free from the car, is settled law. *Finn v. Railway Co.*, 86 Mich. 74 (48 N. W. 696); *Britton v. Railway Co.*, 90 Mich. 159 (51 N. W. 276); *Burke v. Traction & Electric Co.*, 147 Mich. 172 (110 N. W. 524); *Braun v. Railway Co.*, 183 Mich. 569 (150 N. W. 144).

The issue for the jury was a plain and simple one with no complicated questions of law involved. The jury were plainly told by the court that to recover plaintiff must show that he was free from contributory negligence, and, as charged in his declaration, "that the car stopped in order to allow the plaintiff and other passengers to alight therefrom, and that it started up before it had given the plaintiff a reasonable time in

which to alight, and that in his effort to alight, or while alighting, he received injuries in consequence thereof," etc.; that if he jumped from the car before it came to a full stop, or "if the accident occurred by reason of a hole in the highway, he could not recover," nor "by reason of failure to ring the bell."

We are of opinion that the testimony, taken as a whole, fairly presented an issue of fact to go to the jury which was plainly explained and submitted to them by the court under a sufficient charge, are unable to find that the verdict was excessive or so palpably against the weight of evidence as to demand that it be set aside, and discover no good reason in law for disturbing the judgment of the trial court.

The judgment is affirmed.

STONE, C. J., and KUHN, OSTRANDER, BIRD, MOORE, BROOKE, and PERSON, JJ., concurred.

GAINES v. GRAND TRUNK RAILWAY CO. OF CANADA.

1. RAILROADS—MASTER AND SERVANT—EMPLOYERS' LIABILITY ACT
—NEGLIGENCE OF FELLOW SERVANT—CONTRIBUTORY NEGLIGENCE.

Plaintiff left his work of repairing a car to assist two fellow laborers in fixing a "gun barrel drawbar," part of a Westinghouse friction gear. On striking the coupling or drawbar with a hammer, a spring was released which flew and struck plaintiff, injuring him severely. He did not know of the presence of springs in the drawbar and was not familiar with the construction of the coupling, but placed himself in front of the gun barrel and struck it. *Held*, that the Federal employers' liability act was

controlling and that there was no liability if plaintiff assumed the risk of his injury, a defense open to defendant, as it was at common law, and that he must prove actionable negligence on the part of his employer. 35 U. S. Stat. 65, U. S. Comp. Stat. 1913, §§ 8657-8665.

2. SAME—NEGLIGENCE—DEFECTS.

It was the intention of Congress to base the action upon negligence only and exclude responsibility of the carrier to its employees for defects and insufficiencies not attributable to negligence.

3. SAME—INSTRUCTING SERVANT—DUTY.

A master is not called upon to anticipate every possible accident, and may leave an employee to learn the hazards of the business as he learns the business itself, from his associates and experience, where the hazards are not extraordinary.

4. SAME—RISK ASSUMED—NEGLIGENCE.

Where the relationship of master and servant existed, and, though not directly ordered to do what he did, where he was acting in the line of his employment, which was the repair of cars, including drawbars, plaintiff could not be said to have acted as a mere volunteer, but, under the recognized rule that workmen engaged in repair work of defective or dangerous appliances, etc., assume the added risk incident to the existing condition of the instrumentality or place of work, he could not recover.

5. SAME—GENERAL RULE.

One engaged in the repairing of defects assumes the risk of injury incident to their damaged condition, the risk being an ordinary one.

Error to Shiawassee; Gilday, J., presiding. Submitted June 13, 1916. (Docket No. 67.) Decided September 27, 1916.

Case by Clarence D. Gaines against the Grand Trunk Railway Company of Canada and others for personal injuries. Judgment for defendant on a directed verdict. Plaintiff brings error. Affirmed.

Terry & Parsons, for appellant.

Harrison Geer (*W. K. Williams*, of counsel), for appellee.

STEERE, J. While employed as a car repairer in defendant's repair yards at Durand, Mich., plaintiff was injured as the result of striking the plunger of a defective drawbar with his hammer and thus releasing the compressed spring at its base, which threw the plunger, or other interior parts upon which the spring acted, violently out of the end of the drawbar in front of which he stood, and against him. On a former trial it was shown that the drawbar was part of a foreign car which came under defendant's control while engaged in interstate commerce, and was then being repaired in compliance with requirements of a Federal act, for which reason it was held by this court that, if any action would lie, recovery would be possible only upon a declaration framed under an appropriate Federal law. 181 Mich. 376 (148 N. W. 397). Plaintiff's declaration was amended to comply with this suggestion prior to the trial now here for review, at which the court under a directed verdict rendered judgment of no cause of action on the ground that no negligence on defendant's part was shown; and "there was no emergency calling for assistance from plaintiff relative to that car. That the services he was attempting to render were merely voluntary and he, being a volunteer, assumed the risk of all dangers incident to the work at hand; and that he did, as a matter of law, assume the danger of the spring in the friction draft gear, when released, flying out and injuring him."

The substance of defendant's charged negligence, as more elaborately detailed in plaintiff's declaration, was failure to properly inspect the crippled car and more definitely determine the nature of its defects, failure to warn plaintiff of the dangers attending an attempt

to take apart a drawbar of the kind and in the condition of the one by which he was injured, and failure to instruct him as to the proper and safe way of doing so.

The accident occurred December 7, 1911. Plaintiff had then been steadily in defendant's employ as a car repairer at Durand since July 27, 1911. About 30 men were employed in the repair yards under a foreman named Decker. Under him was an assistant foreman, or head car repairer, named Seeburger, directly in charge of the work, whose duties were to direct the men and see that the repairs were properly made. The repairers generally worked upon the various cars which had been placed in the yard on one of the special tracks for repairs in couples, to most effectually carry on the work and readily assist each other as the nature of the repairs to be made at times required.

Plaintiff testified that when first employed he had no previous experience in that capacity and was directed to go to work the next morning with a car repairer named Bullock, as his helper, which he did, continuing to work under and most of the time with him until injured. Bullock testified that when plaintiff came to work with him he had himself been working there "possibly three months." Each from the beginning received equal pay; all repair men in the yard doing that kind of work being paid the same wages. Their work as general car repairers varied according to what was required, consisting of changing wheels, putting in or on column bolts, brake beams, handholds, brake shoes, levers, repairing defective drawbars, etc., and in general making any and all required repairs below the body on cars sent to the repair yards, or "rip tracks," for that purpose and marked with a "bad order" card, except needed repairs on air brakes and any required carpenter work.

Plaintiff's intelligent description of the nature and

method of doing this work, and of the various parts and appliances of the different cars sent in for repairs, about three to one being foreign cars as he recollected it, was strongly confirmatory of Bullock's statement that in almost daily making or assisting in making the various kinds of repairs required plaintiff's experience had been such that he would understand any defective condition in a car as well as Bullock. Plaintiff called Bullock his foreman. Bullock called plaintiff his partner, and in explanation testified that he "wasn't foreman, but we worked together. He came to me and asked me how you would do things, and I would tell him best I knew how; * * * and a little later they put a fellow in there with us named George Everson"; that Seeburger directed them as to the work they should do, but they did what they saw was to be done and there was no difference as to which one should do certain parts, each assisting the other when called to come and help, and he thought "it would be with my partner to come and help me without my asking him"; that there were from 50 to 100 cars on the rip tracks for repairs most of the time, more of them foreign cars than those of defendant, requiring repairs before they could go further. It may fairly be inferred from their testimony that while the two workmen were of the same rank and pay, when working together as they usually did, plaintiff looked to and followed the directions of Bullock, who was the older employee, whenever any question arose as to what he should do next or how any special thing should be done.

On the day of the accident Bullock had left plaintiff at work alone repairing a wooden gondola D. & M. car, "putting in draft timbers, bolts, brake shoes, etc.," as plaintiff describes his work, and Bullock was working with Everson on a B. & O. car near by, the coupling of which was out of repair owing to some defect in

its drawbar or draft gear. The cars of that line were equipped with a drawbar, known as the Westinghouse friction gear, commonly called in railroad parlance a "gun-barrel drawbar." It was shown that all drawbars work upon the same principle and contain springs to relieve the shock of cars coming together, but they vary in appearance and detail of construction, some being incased entirely in iron and some in wood and iron, other types being more common than the "gun barrel" which had, however, been in service on some eastern roads for 12 or 14 years, being used by the Pennsylvania, Chesapeake & Ohio, and Baltimore & Ohio systems. This drawbar had a cylindrical metal outer shell said to be about 8 inches in diameter and 20 inches or more in length. Two springs, one within the other, were placed at the rear or bottom of the barrel with a plunger having an enlarged base against them and two other springs ahead or above the plunger at the forward or open end of the draft gear fastened to the coupler or drawhead, the entire drawbar weighing 200 pounds or more. Bullock and Everson removed this drawbar from the car they were repairing and laid it beside the track. They had discovered that the upper or front springs were broken and the plunger compressed too far into the cylinder. The springs at the base of the plunger were not visible, but they knew that they were either compressed or broken, and that it was necessary to remove the plunger to ascertain which. Failing to easily release the plunger, Bullock called over to another car repairer named Edison to come and look at it, saying, as he testified, that he thought "there is another spring down in there; you have got to take off this cap and see whether it is broken." The consensus of opinion apparently was that the spring was broken and Edison hit the plunger several times in an unsuccessful attempt to get it out. Bullock then placed two wooden blocks on

the ground with a space between them, ending up the drawbar so the plunger would be between them and attempted to loosen it by jarring the drawbar up and down on the blocks.

Plaintiff had just then finished making repairs to the car upon which he had been working alone all the morning, and went over where they were working for the purpose, as he states, to "receive orders" from Bullock, "to find out what to do," and noticed that they were trying to release the plunger in the gun-barrel drawbar which he saw lying on the ground, of which he says he "had never seen a device of this kind before," that "it was a very peculiar affair," but "what it was I didn't know." Having observed their unsuccessful efforts, he set the drawbar on end with the plunger pointing up towards him and striking it with his hammer released the spring, with disastrous results to himself. Of the event he testifies:

"Then I set the gun barrel up in the same position it was when Mr. Edison was hitting it with a two-pound machine hammer, struck it with a common, ordinary blow and before I came to myself, I was hit, cut, and knocked down and jarred internally. * * * I never examined it at all, just looked at it and hit it with the hammer as it appeared to me the trouble indicated was that the plunger was stuck to one side and all that was necessary was to straighten it up and put on new springs and put it back in its proper position."

Also that he did not know there were springs at the base or that there was any danger in doing as he did.

Bullock's undisputed description of plaintiff's intervention and the accident is as follows:

"When Edison and I were there at work I saw Gaines come up and Gaines suggested to me to let him try it. He said, 'Let me try it; I can get it.' Without any instructions from Edison or me he took

the hammer and struck it on the side. He had to bend over it in order to hit it and when he struck it it let loose, and which is the way the accident occurred."

Seeburger, the repair foreman, testified that his general duties were to see that the repairs on the rip tracks in the yard were properly made, and to direct and instruct the men with reference to the work, and that many Baltimore & Ohio cars are repaired there each year; that he was there on the day of the accident, although he could not say whether he saw the gun-barrel drawbar in question, but when any such condition arises with any of the workmen in making repairs they could and should refer the matter to him first before attempting to make the repair "if they didn't understand how to handle it."

This action being brought under the so-called Federal employers' liability act of 1908 and amendments thereto (35 U. S. Stat. 65, U. S. Comp. Stat. 1913, §§ 8657-8665), that statute and decisions of the Federal courts upon it are controlling. By it the defense of fellow-servant's negligence is taken away and contributory negligence does not bar recovery, being available only in reduction of damages proportionate to the amount of negligence attributable to the employee.

The rule as to the assumption of risk remains, except in those cases where the defendant has been guilty of violating some statute enacted for the safety of employees, and by such violation contributed to the injury complained of. In *Seaboard Air Line Ry. v. Horton*, 233 U. S. 492 (34 Sup. Ct. 635, L. R. A. 1915C, 1, Am. & Eng. Ann. Cas. 1915B, 475), the court said upon that subject:

"It seems to us that section 4, in eliminating the defense of assumption of risk in the cases indicated, quite plainly evidences the legislative intent that in all other cases such assumption shall have its former

effect as a complete bar to the action. * * * The risks may be present, notwithstanding * * * all reasonable care on his (plaintiff's) part. Some employments are necessarily fraught with danger to the workman—danger that must be and is confronted in the line of his duty. Such dangers as are normally and necessarily incident to the occupation are presumably taken into the account in fixing the rate of wages. And a workman of mature years is taken to assume risks of this sort, whether he is actually aware of them or not."

No violation of any safety appliance act or other statute, nor negligence of fellow servants, are involved here; but the defense of assumption of risk is open as at common law, and it is to be borne in mind that, however the accident happened or whatever the result, there is no liability under the statute unless plaintiff shows that he was injured through the actionable negligence of his employer, and not otherwise. This thought is thus emphasized in the *Horton Case*:

"It was the intention of Congress to base the action upon negligence only, and to exclude responsibility of the carrier to its employees for defects and insufficiencies not attributable to negligence."

The fact of an accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employee to establish that the employer has been guilty of negligence. *Texas, etc., R. Co. v. Barrett*, 166 U. S. 617 (17 Sup. Ct. 707).

It may well be questioned whether the employer is required to anticipate the possibility of an accident of this nature resulting from the peculiar combination of events disclosed here. As is often the case, the cause of this accident is easiest understood, and the danger to which plaintiff was exposed is best appreciated and apprehended after the fact, for the accident itself not only reveals the cause, but after its occurrence forcibly suggests what might have been done to avoid it.

"The master has a right to expect him (plaintiff) to be alert to inform himself of existing conditions, and he cannot attack the master from the shelter of unjustifiable ignorance. * * * Actual ignorance will not alone suffice to charge a master." *Ragon v. Railway Co.*, 97 Mich. 265 (56 N. W. 612, 37 Am. St. Rep. 336).

"A master is not called upon to anticipate every possible accident, and may leave an employee to learn the hazards of a business, as he learned the business itself, from his associates and experience, where the hazards are not extraordinary." *Nowakowski v. Stove Works*, 130 Mich. 308 (89 N. W. 956).

All drawbars contain springs working upon the same principle, and plaintiff was not unfamiliar with drawbars. He was not immature nor inexperienced; the evidence shows that he was an experienced man of mature years and fair intelligence, with ability to understandingly describe and discuss the nature of the work done at the repair yards where he was employed and the method of carrying it on. He explained the parts and purposes of drawbars upon which he had worked, described the coiled springs used in them, and stated that if there weren't springs in there when the cars came together "they would all smash to pieces." When the accident occurred he had been in this service a longer period of time than Bullock had been when plaintiff states that he was put at work under Bullock, who acted as his instructor and foreman.

The bare contention that plaintiff was a "volunteer" and thereby absolutely precluded from recovery is manifestly not tenable. Technically he was not a volunteer, for it is shown that the relation of master and servant existed between him and defendant, and that, while not directly ordered to do what he did, he was acting in the line of his employment, which was the repair of cars, including drawbars. He was, however,

a volunteer in the particulars that he was not put at work upon this car by any one, nor called upon to assist those who were, that there was no emergency demanding his intervention and he was neither ordered, directed, or requested to do this work. He assumed, uninvited and without any instructions, to do work upon an article which he claimed he had never seen before, had no knowledge of, did not examine, and in relation to which he made no inquiry. He testified:

"I knew it was a piece of iron. What it was I didn't know."

Its appearance seems to have suggested the popular name of a gun barrel, but without examining it or asking any questions of those working upon it he placed himself over the muzzle of this "gun barrel," with a plunger projecting from it and successfully proceeded to try if he could "get it." While not precluding recovery, these facts have a significant bearing upon defendant's duty to him in connection with this accident and his assumption of risk.

In connection with the foregoing it is to be borne in mind that defendant's liability was qualified by the nature of plaintiff's employment, which was for the express purpose of assisting in repairing unsafe and defective instrumentalities and restoring them to a normal condition of efficiency and safety. The recognized general rule as to that class of employment is that workmen engaged to diagnose, repair, and make safe a tool, piece of machinery, appliance, or place to work, which is defective, out of repair, or dangerous, assume the added risk incident to the existing condition of the work or place.

"A person employed to repair defects in appliances assumes the risk of injury incident to their damaged condition. It is the work which his duties require him

to perform, and hence is an ordinary risk." 2 Bailey on Personal Injuries (2d Ed.), p. 985.

This rule is more fully stated with citation of numerous authorities in 3 La Batt on Master and Servant (2d Ed.), § 1176, and quoted with approval in *Baxter v. City of Lansing*, 190 Mich. 542 (157 N. W. 70).

In the light of the foregoing authorities and others to which they refer, we are impelled to conclude that under the undisputed and controlling facts in this case plaintiff is precluded from recovery by having assumed the risks incident to the employment in which he was engaged when the accident complained of occurred.

The judgment is affirmed.

STONE, C. J., and KUHN, OSTRANDER, BIRD, MOORE, BROOKE, and PERSON, JJ., concurred.

LARSKOWSKI v. DETROIT UNITED RAILWAY.

1. CARRIERS—NEGLIGENCE—PERSONAL INJURIES—PROXIMATE CAUSE.

Where plaintiff's decedent was killed while riding on the platform of a street car that was crowded with passengers, and was jarred or crowded out of an open door, he was riding on the platform by permission, as it was necessarily contemplated that when the inside was filled to capacity passengers should stand on the platform, if taken on and accepted as such, and the swerve or jerk of the car, the lurching of the crowd against the decedent and open door may be said to have combined to cause the accident.

2. SAME—NEGLIGENCE—CONCURRING CAUSES.

While the lurching of the car was the immediate cause of the injury, the accident was the result of the concurring

conditions, defendant's negligent failure to close the door, and the lurching, combined. Defendant was liable if it negligently left the door open and thereby aided in bringing about the death of its passenger.

3. SAME—CONTRIBUTORY NEGLIGENCE.

In the absence of any rule of the railway company, or ordinance requiring the doors to be closed on the car, since decedent was riding on the platform by permission, and by implied invitation, considering the crowded condition of the street car, he was not guilty of contributory negligence.

4. SAME—RIDING ON PLATFORM.

Carrying an excess of passengers and permitting them to stand on platform and steps is evidence of negligence.

5. SAME—CONTRIBUTORY NEGLIGENCE.

A person accepted as a passenger and required or permitted to ride on the platform of a street car is not as a matter of law negligent, relieving the company from liability except from gross or wilful negligence. The questions of negligence of defendant in leaving open the door and plaintiff's contributory negligence were for the jury. BROOKE, J., dissenting.

Error to Wayne; Codd, J. Submitted June 15, 1916. (Docket No. 139.) Decided September 27, 1916. Rehearing denied December 22, 1916.

Case by Bronislawa Larowski, as administratrix of the estate of Joseph Larowski, deceased, against the Detroit United Railway for the unlawful killing of plaintiff's decedent. Judgment for defendant on a directed verdict. Plaintiff brings error. Reversed.

Charles Bowles, for appellant.

Corliss, Leete & Moody and *A. B. Hall*, for appellee.

STEERE, J. This action was brought in the Wayne county circuit court by plaintiff as administratrix of Joseph Larowski, her deceased husband, to recover

damages for his death which was caused by his falling from an electric street car being operated by defendant along Forest avenue, in the city of Detroit. Upon the trial a verdict for defendant was directed by the court at conclusion of plaintiff's evidence on the ground that she had failed to produce any proof of actionable negligence on defendant's part as a proximate cause of the accident complained of.

The accident occurred on the evening of September 22, 1913, while deceased was riding on a west-bound cross-town car, on Forest avenue, about midway between Grandy avenue and Chene street. He was a common laborer 51 years of age, in good health, a married man, regularly employed as watchman in a factory at the time of his death, and had taken the car near Mt. Elliott avenue about 6 o'clock that evening to return home from his day's work.

Plaintiff's testimony showed, or tended to show, that the traffic was heavy that evening and the car so crowded that it was very difficult, if not impossible, for deceased to get into the body of the car owing to the number then standing on the platform and within, described by one witness as "a jam," and he therefore rode on the back platform, which was also filled with standing passengers. The car which he boarded was of the kind called a "pay-as-you-enter car," with outside doors inclosing the entrance and exit which could be opened when the car was stopped to receive and discharge passengers and closed so as to prevent their getting on or off when the car was running. It was the custom to do this, but that evening the doors were not closed after the car left Grandy avenue, and about midway in the block a sudden jerk or swing of the car swayed or threw the other passengers standing close together on the rear platform against deceased, who was near the open door, and pushed or crowded him off, so that he fell upon the pavement, striking

violently on his head, causing spinal injuries and concussion of the brain, which resulted in his death.

Taking the testimony introduced by plaintiff as true and viewing it in the light most favorable to her contention, as is required in case of an adverse directed verdict, we think it tends to show that these three things, or conditions, combined to cause the accident—the sudden swerve or jerk of the car, the swing or lurching of the crowd against deceased, and the open door through which he was thrown, or fell. When the questions of negligence and responsibility are at issue the finer distinctions of proximate and remote cause do not always suffice as the test of liability, and sometimes confuse. It might, and probably could, truthfully be claimed that the proximate cause of deceased's death was his fall from the car or, more directly, concussion of the brain, or cerebral hemorrhage, or some other yet more occult physiological injury, but such conclusions, though in one aspect well founded, manifestly suggest no test for determining culpability.

The true test of legal responsibility in cases of this nature was briefly sounded without technical adornment, and approved by the court, in *Denver, etc., R. Co. v. Bedell*, 11 Colo. App. 139 (54 Pac. 280), a case in which the plaintiff while a passenger of defendant attempted, on account of the car being too cold, to close the door which had been left open, and owing to a sudden jerk or lurch of the train fell through the open door and was injured. In connection with a general verdict the jury by special verdict upon a question of fact answered that the negligence of defendant causing plaintiff's injuries was "leaving the door open." In sustaining this verdict the court there clearly stated the rule as follows:

"While the lurching of the car was the immediate cause of the injury, the plaintiff would not have been exposed to the danger of injury, except for the negli-

gent leaving open of the car doors. The accident was the result of the concurrence of the defendant's negligent failure to close the doors, and the lurching of the car; but if the former condition had not existed, the plaintiff would have been unharmed by the latter. A party through whose neglect another is exposed to, and sustains, injury, without any fault of his own, from some concurrent cause with which the negligent party may not be specially chargeable, is responsible for the injury. The injury is the direct and logical result of the negligence."

The general rule there applied to the open door is supported by authorities cited, and recognized in our own decisions. *Swick v. Cement Co.*, 147 Mich. 454, 462 (111 N. W. 110).

It is urged by defendants, however, that the rule of negligence which would apply to regular railroad trains running through the country is not the same in many particulars as that applicable to urban cars, or street car lines operated for comparatively short distances with frequent stops at street crossings; there was no proof made of any rule of the company or city ordinance requiring those doors to be closed on the car when running, in the absence of which there is no presumption of negligence from their being left open, and on the contrary it can fairly be contended that they were not provided for protection of people riding upon the platform, "as it is not contemplated that people shall stand on the platform, but rather to prevent accidents which so frequently occur in getting on and off cars where disputes are always arising as to whether the car was in motion when the passenger was getting on or off."

Deceased was riding upon the platform of this car by permission, and, if the car was crowded within as claimed, by implied invitation, of defendant. When the interior of the car was filled to capacity it was necessarily contemplated that passengers thereafter

received would stand on the platform. That street railways are common carriers of passengers and under their contract of safe carriage are bound to exercise a high degree of care, cannot be questioned.

There is abundant authority that for a street railway to carry passengers greatly in excess of the seating capacity of its cars and permit them to stand on the platforms and steps is evidence of negligence. *Pray v. Railway Co.*, 44 Neb. 167 (62 N. W. 447, 48 Am. St. Rep. 717), and cases there cited.

That a person accepted as a passenger and required or permitted to ride on the platform is not guilty of negligence *per se*, and does not relieve the company from all liability except for gross, wilful, and wanton misconduct by assuming all other risks, is held in *Upham v. Railway*, 85 Mich. 12 (48 N. W. 199, 12 L. R. A. 129).

But aside from all questions of operating overcrowded cars and permitting passengers to ride in dangerous positions on platforms, steps, running boards of open cars, etc., plaintiff was entitled to go to the jury on the question of leaving these doors open when the car was running, with passengers riding upon the platform. There was evidence that it was the custom to close them. To have them closed when running was manifestly a wise precaution and a factor of safety. That it might not be negligence to operate cars of a different design, without doors inclosing its platforms, is immaterial. This was a pay-as-you-enter car, equipped with such safety appliances, the use of which eliminated certain possible dangers. Under the circumstances of this case it can well be contended that it was the duty of defendant to use them as they could best be used to protect its passengers, and its failure to close these doors when running was negligence. *McMahon v. Railway & Light Co.*, 127 La. 544 (53 South. 857, 32 L. R. A. [N. S.] 346); *Augusta R.*

Co. v. Glover, 92 Ga. 132 (18 S. E. 406). In the latter case an electric car upon which a boy of 15 years rode as a passenger was equipped with gates on the side of the platform next to a parallel track, which were left open, when he alighted from the car upon that side and was struck and killed by a passing car on the other track. Having provided gates which, if closed, would have prevented him getting off on that side, the defendant neglected to use them. Of this the court well said:

"There may be no negligence whatever in failing to have gates * * * provided the equipment is sufficient to come up to the standard of extraordinary diligence. * * * But when a company has provided gates, due diligence might require it to use them, and failure to use them might be negligence in the given instance. Whether it would be or not is a question of fact for the jury. * * * And this is so irrespective of the particular object which the company had in view in procuring the gates, or of its own practice in their use. * * * Extraordinary diligence may require the carrier to use what he has, though it would not require him to have as much as he has provided."

We are satisfied for the reasons stated that plaintiff's testimony raised material issues of fact which she was entitled to have submitted to the jury under proper instructions. It follows that the judgment must be reversed, with costs, and the case remanded for a new trial.

STONE, C. J., and KUHN, OSTRANDER, BIRD, MOORE, and PERSON, JJ., concurred with STEERE, J.

BROOKE, J. I am of opinion that no negligence was shown on the part of the defendant.

LAVIGNE *v.* WAYNE CIRCUIT JUDGE.

APPEAL AND ERROR—BILL OF EXCEPTIONS—PRACTICE—MANDAMUS.

Where relator's petition for mandamus represented that a transcript of testimony was delivered to relator's attorney in September, 1915, when he was sick, and that the judge, who was not a regular incumbent of that circuit, had not sat as circuit judge for the trial of causes since a date specified, that was in fact incorrect, and where relator claimed that he obtained a stay and stipulation extending the time to settle a bill of exceptions, but did not serve a proposed record until the fifth month thereafter, with notice of settlement thirty days later, and a motion to extend the time was denied because untimely made, the refusal of the application was not reversible in a mandamus proceeding, and the order did not constitute an abuse of the judge's discretion.

Mandamus by Joseph P. Lavigne against Joseph Barton, judge of the twenty-seventh judicial circuit, acting in Wayne county, to compel respondent to show cause why an order extending the time for settling the bill of exceptions in the case of Edward C. Nagel against Joseph P. Lavigne should not be granted. Submitted September 19, 1916. (Calendar No. 27,386.) Writ denied September 27, 1916.

M. N. Mendelsohn, for relator.

Corliss, Leete & Moody, for respondent.

PER CURIAM. In the cause *Edward C. Nagel v. Joseph P. Lavigne*, in the Wayne county circuit court, on trial before Hon. Joseph Barton, circuit judge of the Twenty-Seventh judicial circuit, a verdict for plaintiff was directed June 25, 1915, and judgment was entered on the verdict July 7, 1915. The defendant, who was represented by Moloney & Mendelsohn,

filed a bond August 6, 1915, and an order staying proceedings was entered August 17, 1915, which was followed August 21, 1915, by a stipulation of counsel, pursuant to which an order was made extending until September 15, 1915, the time to settle a bill of exceptions. No bill of exceptions was served upon plaintiff's attorneys until February 21, 1916, when with the proposed bill there was served a notice of settlement on March 21, 1916. The bill was returned, plaintiff's attorneys declining to accept it. Before said proposed bill of exceptions was filed, notice had been given to the attorneys for defendant of a motion to vacate the order of August 21, 1915, staying proceedings. Meantime, in October, 1915, one of the attorneys for plaintiff, by telephone, told Mr. Moloney, one of the attorneys for defendant, in substance, that if an appeal was to be taken plaintiff desired the cause heard at the January, 1916, term of the Supreme Court and was told by Mr. Moloney that the bill of exceptions was prepared and would be served on that day or the next. There was no other communication of counsel about the matter. In May, 1916, a motion was made by defendant to extend the time to settle a bill of exceptions. It was opposed. Coming on to be heard before Judge Barton, on May 13, 1916, the motion was denied. On application to this court an order to show cause why the motion should not be granted was made. The return to the order is before the court. It appears therefrom that Judge Barton sat as judge in the circuit court for Wayne county September 21st to 25th, inclusive, September 27th to 30th, inclusive, 20 days in October, 21 days in November, and 4 days in December, 1915, 21 days in January, 1916, and, for the purpose of hearing motions, March 18, 1916. Of the last-mentioned date due notice was given.

The petition for the order to show cause states that

the transcript of testimony was delivered to Mr. Moloney September 17, 1915, but that he, who had principal charge of the case, was ill and, under medical advice, gave up all work in October and left Detroit for two weeks in the pursuit of health, and from the time of his return, "owing to his physical condition, has been unable to do any trial work and practically no office work."

It is further stated in the petition for the order to show cause, and was a material allegation of fact considered when the order to show cause was granted, that Judge Barton "has not sat as a circuit judge for the trial of causes in circuit court for the county of Wayne since the end of June, 1915," except on March 18, 1916, at which last-mentioned date Mr. Moloney was absent from the city of Detroit. Of this statement it is said in the brief:

"Had it not been for the illness of John E. Moloney, the attorney in charge, unquestionably the bill of exceptions would have been submitted long before February, 1916, and when relator made the statement in his petition that the said respondent, Judge Barton, had not been in the city of Detroit since the trial of said cause until May 13, 1916, with the exception of March 18th of the same year, it was not his intent to deceive this court, but to say that the said Judge Barton had not acted as Wayne county circuit judge from February 21, 1916, this being the first time that we had the slightest intimation that there would be any objection upon the part of counsel for the plaintiff to the acceptance of the proposed bill of exceptions until May 13, 1916, with the exception of the day in March at which time said John E. Moloney was absent from the city."

But the statement did deceive the court, since it indicated that there had been no opportunity to apply to the trial judge for an order extending the time to settle a bill of exceptions and no opportunity to settle the bill. Otherwise than this the showing made in

the court below and here is insufficient to warrant an extension of the time. A motion to extend the time on account of illness of one of plaintiff's attorneys, seasonably made, would have permitted an investigation of the fact of illness, and whether the fact, if established, or admitted, was a sufficient reason, other circumstances considered, for an extension of time.

There has been no abuse of discretion, and the writ is denied, with costs to the plaintiff in the original cause.

OCTOBER TERM, 1916.

BOARD OF STATE TAX COMMISSIONERS *v.* KOHLER.

TAXATION—STATE TAX COMMISSION—REVIEW OF ASSESSMENT.

Under the general tax law the State tax commissioners are given authority to inspect the tax rolls, after they have been passed on by the various reviewing boards, and, if the investigation warrants, may issue an order to the assessor whose rolls are under review to appear with his assessment rolls therefor, and the State board is authorized not only to inspect and investigate the rolls, but also to examine witnesses and documents. Sections 148-150. Neither the order by the commissioners nor the petition for mandamus is fatally defective for failure to make it apparent how it came to be shown that the assessment required an investigation or review.

Mandamus by the State Board of Tax Commissioners against John Kohler and others, constituting the board of assessors of the city of Detroit, to compel respondents to turn over to relators for inspection and review the assessment rolls of said city. Submitted October 24, 1916. (Calendar No. 27,556.) Writ granted November 6, 1916.

Grant Fellows, Attorney General, and *L. W. Carr*, Assistant Attorney General, for relator.

Harry J. Dingeman and *Vincent M. Brennan*, for respondents.

STONE, C. J. This is a petition for mandamus to require the defendants, who constitute the board of assessors of the city of Detroit, to turn over the assessment rolls of said city to plaintiff, the board of State tax commissioners, to enable it to review the same.

An order to show cause having been made, and defendants having answered, we are met, at the threshold, with the objection that the plaintiff's petition is fatally defective because it does not set forth a state of facts such as is required by the statute to exist before an order looking to the review of assessments, such as the order referred to in the petition, Exhibit 1, may be issued. Paragraph 4 of plaintiff's petition reads as follows:

"That it was made to appear to your petitioners, constituting and composing the board of State tax commissioners, that the assessments of real and personal property in the city of Detroit, and in the various wards thereof, as the same appear on said rolls, have been made so irregularly and so unlawfully that a review of said rolls by your petitioners, acting as the board of State tax commissioners aforesaid, in accordance with the statute in such case made and provided, was and is necessary and imperative in order that compliance with the law relating to the assessment and collection of taxes may be had."

The preamble to the order issued by the plaintiff is, in part, as follows:

"Whereas, it has been made to appear to said board of State tax commissioners that property in said city has been so irregularly and unlawfully assessed that adequate compliance with law cannot be secured except by a review of said assessment rolls," etc.

Paragraphs 4 and 5 of the answer of defendants are, in part, as follows:

"(4) Respondents have no knowledge as to what has been made to appear to relator, and therefore neither admit nor deny the allegation contained in paragraph 4 of said petition and leave relator to its proof.

"(5) Respondents admit that a document, purporting to be a valid order, was issued by relator, as described in paragraph 5 of its said petition, and admit that Exhibit 1 is a true copy of such document; but

respondents deny that such order was issued in conformity with any valid statute of the State of Michigan, and are advised and aver that such order issued without any authority in law, and contrary to the Constitution and laws of the State of Michigan, and especially of the charter of the city of Detroit."

Section 152 of the general tax law, as amended by Act No. 153, Pub. Acts 1913, being the section of the act relied on herein by plaintiff, reads:

"After the various assessment rolls required to be made under this act or under the provisions of any municipal charter shall have been passed upon by the several boards of review, and prior to the making and delivery of the tax rolls to the proper officer for collection of taxes, the said several assessment rolls shall be subject to inspection by said board of State tax commissioners or by any member or duly authorized representative thereof and in case it shall appear to said board after such investigation, or be made to appear to said board by written complaint of any taxpayer, that property subject to taxation has been omitted from said roll, or individual assessments have not been made in compliance with law, the said board may issue an order directing the assessor whose assessments are to be reviewed to appear with his assessment roll and the sworn statements of the person or persons whose property or whose assessments are to be considered at a time and place to be stated in said order, said time to be not less than seven days from the date of the issuance of said order, and the place to be at the office of the board of supervisors at the county seat or at such other place in said county in which said roll was made as said board shall deem most convenient for the hearing herein provided. *

The remainder of the section is immaterial to the point under consideration.

Specifically stated, the objections of defendants to the sufficiency of the order and petition are as follows:

"(1) Nowhere is it set forth in this order that, prior to its issuance, the assessment rolls had been inspected by the board of State tax commissioners, and that it

appeared to said board after such investigation, or by the written complaint of a taxpayer, that property subject to taxation had been omitted from the rolls, or individual assessments had not been made in compliance with the law.

"(2) Nowhere is it set forth in the petition that the order, Exhibit 1, was preceded by an inspection and an investigation by relator of the assessment rolls prepared by respondents, or by a written complaint of a taxpayer, and that such investigation or such complaint made it appear that property had been omitted from the rolls, or that assessments had been made in noncompliance with the law. The order of the commission and the petition both recite that 'it was made to appear' to relator that property in Detroit had been irregularly and unlawfully assessed."

It is further urged by defendants that, in so far as the petition shows the alleged unlawful assessments may have been brought to the attention of the plaintiff by a verbal complaint of a taxpayer, or as the result of an inspection and investigation of the rolls made by some one other than the board of State tax commissioners, there are numberless conceivable mediums of information through which it "may have been made to appear" to plaintiff that assessments made by defendants were irregular or unlawful, but that there are only two mediums of information mentioned in the statute which would authorize the issuance of an order such as plaintiff attempted to make here; that the statute requires the happening of either one of two well-defined conditions precedent before an order, reviewing assessments and directing the assessor to appear with his rolls, may be made. And it is claimed that the board of State tax commissioners has no power under the statute to make such order, unless it is made to appear to it that property has been omitted from the rolls, or that assessments have been made in disregard of the law, after it has made its own inspection and investigation of the rolls, or upon receipt

by it of the written complaint of a taxpayer, and that the order and petition in the present case are defective for failure to show the existence of one or the other of these facts.

It is well that we note here the changes that have been made, from time to time, in said section 152 of the general tax law. As originally enacted in 1899, this section fixed no condition precedent to a review by the State board such as is contained in the present law. The relevant portion of that original act reads:

"* * * And in case it shall appear, or be made to appear to said board that property subject to taxation has been omitted from said roll, or individual assessments have not been made in compliance with law, the said board may issue an order," etc. Pub. Acts 1899, No. 154, § 152.

It will be observed that the act did not specify how or from what source the irregularity should be made to appear to the State board. It merely required that it appear, or be made to appear, in some way to the board that an irregularity had occurred in order to authorize an order for review. The 1899 act was first amended by Act No. 281, Pub. Acts 1905, so that the clause under consideration was made to read:

"And in case it shall appear, or be made to appear, by written complaint of any taxpayer residing in the assessment district, to said board that property subject to taxation," etc.

It thus appears that where before the board could act on its own motion whenever it received from any source information pointing to irregularities, under the act of 1905, it could only order a review when the same was initiated by a resident taxpayer's written complaint. The next amendment to section 152 was made by Act No. 8, Pub. Acts 1909, which eliminated the words following "taxpayer," viz., "residing in the

assessment district," so that the section was made to read:

"And in case it shall appear, or be made to appear, by written complaint of any taxpayer to said board that property," etc.

After this amendment a taxpayer residing outside the assessment district could file the complaint against the action of the local assessors. In 1911 the legislature, by Act No. 17, again amended section 152, and by such amendment once more restored to the board the power to call a review on its own motion upon compliance with certain conditions. The 1911 amendment read:

"And in case it shall appear after investigation by said board, or be made to appear to said board by written complaint of any taxpayer, that property," etc.

This gave the board the right to order a review on its own motion after investigation. The act of 1911, it will be noted, did not specify in terms what sort of an investigation should be conducted. A further amendment was made by Act No. 153, Pub. Acts 1913, which act put the section into the form in which it stands today. The semicolon which appeared in the 1911 act at the end of line 7 of section 152, just before the clause beginning "and in case it shall appear after investigation by said board," has been omitted, and the word "such" has been inserted in this clause just before the word "investigation." The 1913 act, after stating that the local assessment rolls shall be subject to inspection by the State board, provides that "after such investigation" the board may order a review, and may direct the assessor to appear thereat with his rolls.

It is urged that plaintiff's petition would not show good grounds for the issuance of the writ if the 1911 act were now in force, for the reason that the petition

does not set forth that an investigation of any sort, or a taxpayer's written complaint, preceded the issuance of the order for review. This court has recognized the changes which have been made, from time to time, in the statute. *Newport Mining Co. v. City of Ironwood*, 185 Mich. 668 (152 N. W. 1088). The question raised by the brief of defendants is purely a technical one, which does not reach the merits of the case. It is the claim of plaintiff that the question is not properly raised by the answer, and is an after-thought of counsel. But, treating the question as properly raised by the pleadings, we think defendants' criticism of the petition and order too technical and narrow.

The sole point raised is that the order and petition should affirmatively allege that the former was based on an inspection of the rolls. We do not think that position well taken; but, if it were, it may be presumed that the State board had procured its information in the manner prescribed by the statute. This was official action, and we see no reason why the general presumption as to the validity of official action might not properly be invoked. But the statute does not in terms require an inspection of the rolls by the board. The statute simply provides that:

"The said several assessment rolls shall be subject to inspection by said board of State tax commissioners or by any member, or duly authorized representative thereof." Pub. Acts 1913, No. 153, § 152.

The board might get its information from any of the different sources pointed out by the statute. It is well to examine the preceding sections of the statute.

Section 148 provides for special meetings of the board to be held at any place most convenient. The board and the members thereof, or any duly authorized representative thereof, shall have access to all books, papers, documents, statements, and accounts on

file or of record in any of the departments of State, subject to the rules and regulations of the respective departments relative to the care of public records. The board and the members thereof, or any duly authorized representatives thereof, shall have like access to all books, papers, documents, statements, and accounts on file or of record in counties, townships, and municipalities. Said board may subpoena witnesses, and has power to examine witnesses under oath, said oath to be administered by any member of said board or by the secretary thereof. The board is then given power to examine books, papers, or accounts of any corporation, firm, or individual owning property liable to assessment for taxes, general or specific, under the laws of the State; and any officer or stockholder of any such corporation, any member of any such firm, or any person or persons who shall refuse to permit inspection, or neglect or fail to appear before said board in response to its subpoena, or to testify as provided for therein, shall be deemed guilty of a misdemeanor, etc.

By section 150 it is made the duty of the board to have and exercise general supervision over the supervisors and other assessing officers of this State, and to take such measures as will secure the enforcement of the provisions of the act, to the end that all the properties of this State liable to assessment for taxation shall be placed upon the assessment rolls, and assessed at their actual cash value, to confer with and advise assessing officers as to their duties under the act, and to institute proper proceedings to enforce the penalties and liabilities provided by law for public officers, officers of corporations, and individuals failing to comply with the provisions of the act. By subdivision 3 of said section 150, it is made the duty of the board to receive all complaints as to property liable to taxation that has not been assessed, or that has been

fraudulently or improperly assessed, and to *investigate* the same, and to take such proceedings as will correct the irregularity complained of, if any is found to exist.

It is too narrow a view to say that the words "such investigation," found in section 152, refer simply to the "inspection" of the rolls; it is more reasonable to hold that they refer to all the other avenues open to investigation. The words "inspection" and "investigation" are not synonymous; and it is more reasonable to say that the words "such investigation" refer to the investigation, and examination of witnesses and documents referred to in the preceding sections, as above noted. While the rolls are subject to the inspection of the board, the statute does not make it obligatory upon the board to make inspection thereof. A mere inspection of the rolls probably would not determine whether there was an improper assessment, but "such investigation," as is mentioned in the preceding sections of the statute referred to, would naturally tend to throw light upon the subject. In construing section 152 we should look, not only to its general purpose, but also to the other provisions of the tax law that are in point. So considered, an intent is manifest to confer on the board of State tax commissioners authority to conduct a review whenever it is made to appear that the local assessment rolls have not been prepared in accordance with the law; in other words, when it appears that property is not being assessed at its true cash value, or that property is being omitted altogether. As stated, an inspection of the rolls alone might not, and probably would not, determine the existence of either fact.

Neither the order nor the petition is ideal or as full and explicit as might be desired, but we think that neither is fatally defective, and as the objection urged does not go to the merits of the case, and, having reached the conclusion that the act cannot be given

the construction contended for, and that it was intended to give large powers of review to the State board, we are constrained to hold that the writ of mandamus should issue as prayed for by plaintiff.

No other question is raised by the brief of counsel.

The other questions raised by the answer have been disposed of adversely to the contention of defendants by the decisions of this court. See *Board of State Tax Com'rs v. Board of Assessors*, 124 Mich. 491 (83 N. W. 209); *Board of State Tax Com'rs v. Quinn*, 125 Mich. 128 (84 N. W. 1); *Bialy v. City of Bay City*, 139 Mich. 495 (102 N. W. 1033); *Attorney General v. Board of Supervisors*, 178 Mich. 513 (144 N. W. 883).

Let the writ issue.

KUHN, OSTRANDER, BIRD, MOORE, STEERE, BROOKE, and PERSON, JJ., concurred.

MICHIGAN MUTUAL HOME INSURANCE CO. v. PERE
MARQUETTE RAILWAY CO.

1. INSURANCE—FIRE POLICY — RAILROADS — NEGLIGENT SETTING OF
FIRES.

Where a witness saw a train pass near a field of stubble which was shortly after on fire and which set fire to the buildings on the farm of one who was insured by the plaintiff, and it was shown that the wind was blowing from the railroad towards the buildings, the evidence presented a question for the jury as to the origin of the fire, and under evidence tending to show, in defense, that the locomotive had been inspected and was in good condition, the question of its fitness for operation was for the jury.

2. EVIDENCE—COMPROMISE AND SETTLEMENT.

Plaintiff was also entitled to the request to charge that in determining whether the engine was in good working order or not the jury might consider the fact that subsequent to the bringing of suit the defendant paid the property owner \$2,800 for his loss, not covered by insurance; it was not incompetent under the rule excluding proof relating to negotiations for compromise, upon evidence that the payment had not been made under circumstances that the court could infer an understanding that evidence of it should not be offered.

3. SAME—PROVINCE OF COURT.

Whether the testimony is admissible in any particular case is a preliminary question to be decided by the trial court, and is analogous to the determination of the admissibility of confessions in criminal cases.

4. SAME—AMOUNT OF CLAIM—INSURANCE.

Testimony having a tendency to show that the adjustment made with the property owner proceeded along usual lines, and was not so much a question of liability as of amount, authorized the court in receiving it as proof of, or an admission of, liability.

5. SAME—AMENDMENT.

And taking into consideration the fact that plaintiff offered no proof of negligence in operating the locomotive, it was not error of a harmful nature to permit an amendment of the declaration at the trial so as to count upon negligence in operating the engine; nor was defendant necessarily entitled to an adjournment on account of surprise.

Error to Oakland; George W. Smith, J. Submitted June 28, 1915. (Docket No. 57.) Decided December 21, 1916.

Case by the Michigan Mutual Home Insurance Company against the Pere Marquette Railway Company for the negligent operation of its locomotives and the setting of a fire. Judgment for plaintiff. Defendant brings error. Affirmed.

Parker, Shields & Brown (DeWitt H. Merriam and Pelton & McGee. of counsel), for appellant.

Perry & Lynch, for appellee.

BIRD, J. In July, 1911, Ira Wilson was the owner of a farm in Wayne county, lying near Elm station along the line of defendant's railroad. On Sunday, July 9th, of that year, his farm buildings with most of their contents were destroyed by a fire which, it is asserted, originated on the defendant's right of way and was communicated to his farm buildings through a dry stubble field. To satisfy two policies of insurance which Wilson held in plaintiff company, he was paid \$2,636.95. Wilson also made a claim against the defendant railroad company, and after receiving the insurance money the defendant paid him \$2,800 in settlement of his claim. The plaintiff insurance company then brought this suit to compel defendant to reimburse it for the amount paid on the policies, on the theory that the fire was caused by its negligence. The plaintiff had judgment for the amount of its claim, and defendant assigns error.

1. A directed verdict was requested because of the failure of the plaintiff "to show that defendant was responsible for the origin of the fire." It appears from the testimony of Mr. Harvey E. Meldrum, who testified as to the origin of the fire, that he was at the station of Elm on the Sunday morning in question awaiting the arrival of an east-bound excursion train. That while so waiting an east-bound freight train passed the station and within a few moments thereafter he saw a fire west of the station on the right of way near the fence; that when the freight train was approaching he looked in that direction, but saw no fire; that the fire spread to the wheat stubble and rapidly through it to the farm buildings 30 rods distant. It also ap-

peared that the wind was blowing in the direction of the buildings and the ground was very dry. This testimony with other of like kind was sufficient to make a case for the jury on the question of the origin of the fire. *Jones v. Railroad Co.*, 59 Mich. 437 (26 N. W. 662); *Hagan v. Railroad Co.*, 86 Mich. 615 (49 N. W. 509); *Clark v. Railway Co.*, 149 Mich. 400 (112 N. W. 1121, 12 Am. & Eng. Ann. Cas. 559); *Potter v. Railway Co.*, 157 Mich. 216 (121 N. W. 808, 22 L. R. A. [N. S.] 1039); *Union Ice Co. v. Railway Co.*, 178 Mich. 346 (144 N. W. 1033); *Pennsylvania Fire Ins. Co. v. Railroad Co.*, 184 Mich. 375 (151 N. W. 578).

2. Appellant contends that it discharged the burden imposed upon it by the statute of showing that the machinery, smokestack, and fire box of the engine were in good repair, and that it was thereby entitled to have the jury so instructed. Three boiler makers, who were in the employ of the defendant in 1911, were produced as witnesses upon this phase of the case. One of them, John Doyle, the day inspector, identified his report (Exhibit 1), which he testified showed that engine No. 502 was O. K.—that is, in good condition. His testimony does not disclose upon what date he inspected the engine, or whether he did it personally, and we are unable to learn from Exhibit 1, as it was not returned in the record. The witness Harrington, the night inspector, testified that he inspected the engine on July 18th, and identified his report thereof (Exhibit 2), which he testified showed that the engine was then in good condition and needed no repairs. Exhibit 2 is not returned in the record. Neither inspector testified as to any personal knowledge of the condition of the engine at or about the time in question, and neither testified that his report was correct, although each testified that his report showed the engine to be in good condition. The third witness, Froy, testified that he knew nothing of the condition of en-

gine No. 502 on the day in question, but testified that the netting or screen used thereon was the standard size mesh, in general use on locomotives, and that the life of the netting was about six months. Mr. Cummings, the engineer in charge, testified that on the morning in question he was hauling 50 cars, that it was down grade through Elm station, and that the engine was not laboring hard when it passed the Wilson premises. It also appeared from his testimony that if the spark arrester were in good repair it would emit some sparks at the rate he was running while passing the Wilson premises, although he was unable to give any opinion as to the life of such sparks.

The testimony bearing on the condition of the engine as appears by the record is not so clear and conclusive as to make it the duty of the trial court to determine the question as a matter of law. The testimony of defendant was fairly open to the inference that the netting or screen was out of repair, or it would not have emitted sparks with sufficient vitality to set fire to the right of way when the engine was coasting down grade. We are of the opinion that the whole question of the negligence of the defendant was a question of fact, and was properly submitted to the jury.

3. Error is predicated upon that portion of the charge which reads:

"In determining whether or not the engine was in good working order, the jury have a right to consider, among other circumstances in the case, the fact that subsequent to the time of this fire and some months thereafter, the defendant company paid to Ira Wilson, whose property had been destroyed, \$2,800, on account of said loss."

It is strenuously insisted by the defendant that this instruction was error, and that the testimony upon which it was based should have been excluded under

the rule that what was said and done by the parties by way of compromising their differences was inadmissible. If the testimony were admissible at all it was upon the theory that the payment of \$2,800 to Wilson by the defendant was an admission of its liability. The general rule regulating the admission of such testimony is stated in *Manistee National Bank v. Seymour*, 64 Mich. 59 (31 N. W. 140). In that case defendant Seymour was denying liability as an indorser on certain promissory notes sued upon. The proof was offered and received that on a certain occasion when he was having an interview with the bank officials, he offered to turn over his bank stock in payment of the notes. This court in passing upon the competency of the proof said:

"The testimony shows that the admission was not made upon an express condition that evidence of it was not to be given, or under circumstances from which the judge could infer that the parties agreed together that evidence of it should not be given. The general rule is that all admissions not expressly made to make peace, and all independent facts admitted during the negotiations for settlement, are admissible in evidence"—citing authorities.

See, also, *Taylor v. Railway Co.*, 101 Mich. 140 (59 N. W. 447); *Grimes v. Keene*, 52 N. H. 330; *Needham v. Sanger*, 17 Pick. (34 Mass.) 500; *Galveston, etc., R. Co. v. Hertzog*, 3 Tex. Civ. App. 296 (22 S. W. 1013); *Chicago, etc., R. Co. v. Rhodes*, 21 Colo. App. 229 (121 Pac. 769); 1 Greenleaf on Evidence, § 192; *Howland v. Bartlett*, 86 Ga. 669 (12 S. E. 1068); *Campbell v. Railway Co.*, 86 Mo. App. 67; *Weiss v. Kohlhagen*, 58 Or. 144 (113 Pac. 46); *Colburn v. Groton*, 66 N. H. 151 (28 Atl. 95, 22 L. R. A. 763).

There is much seeming disagreement among the cases in regard to the admission of this class of testimony, but a study of them discloses that the apparent conflict is due not so much as to what the rule is as it

is to its application to the facts. If the holding in *Manistee National Bank v. Seymour*, *supra*, is to be followed, we are of the opinion that the testimony was properly received. Whether the testimony is admissible in any particular case is a preliminary question to be decided by the trial court, and is analogous to the determination of the admissibility of confessions in criminal cases. *Colburn v. Groton*, *supra*.

In the present case the testimony discloses that Wilson made a claim against the railroad company for \$7,300. This appears to have been made to cover the insurance as well as the additional loss. After receiving the insurance money the defendant paid him \$2,800 for the balance of his claim. It appears that a receipt was given to the defendant, showing, in substance, the purpose for which it was paid, but it was not introduced in evidence. About the only reason assigned in the testimony for the payment, aside from liability, was that the payment was made to avoid litigation because Wilson's land lay along the right of way of defendant. It does not appear from the testimony that defendant denied liability, neither does it appear that payment was made with any understanding, express or implied, that evidence should not be given of the fact of payment, nor is there any testimony showing that when payment was made defendant was not to be prejudiced thereby, nor was it the result of a compromise. So far as the evidence tends to show anything concerning it, it shows the settlement proceeded along the usual lines, and that it was not so much a question of liability as of amount. With no further showing than this we think the court was justified in receiving the testimony.

4. The negligence alleged by the declaration was the failure of the defendant to keep the engine and machinery in repair. Upon the trial the declaration was amended upon the application of plaintiff so as

to cover negligent operation of the engine. Complaint is made because the court refused to grant an adjournment which defendant claimed on account of surprise. In view of the fact that plaintiff offered no proof of negligent operation and did not finally claim any, we think the error, if it were one, was harmless.

We are of the opinion that the judgment should be affirmed.

STONE, C. J., and KUHN, OSTRANDER, MOORE, STEERE, and BROOKE, JJ., concurred. PERSON, J., did not sit.

McKINLEY v. SMALL.

1. SALES—BREACH OF WARRANTY—BILLS AND NOTES—EVIDENCE.

In an action on a promissory note, defendants claiming damages for breach of warranty of a stallion, which proved impotent, according to defendants' evidence, testimony on plaintiff's behalf that the horse was made weak by sickness and improper care, while in the hands of the defendants, raised an issue of fact that should not have been taken away from the jury.

2. SAME—TRIAL—CHARGE.

Where there was evidence that the horse was defective when he was delivered, and not such an animal as the plaintiff had warranted, the defendants were entitled to have the question submitted to the jury under instructions that if the jury found that the horse was not sexually defective when he was delivered, and his failure to meet the terms of warranty was due to sickness and improper handling, plaintiff could recover on the notes.

3. SAME—RESCISSION—WARRANTY.

And when the defendants were not relying on a rescission, but on the contract of warranty, which required the vendor to replace the horse if he did not conform to the provisions of the warranty, the court was in error in holding that defendants could not defeat the plaintiff's action on the note for the reason that there had been no rescission and return of the stallion.

Error to Newaygo; Barton, J. Submitted January 7, 1916. (Docket No. 61.) Decided December 21, 1916.

Assumpsit by John McKinley against Fred L. Small and others on promissory notes of defendants. Judgment for plaintiff on a directed verdict. Defendants bring error. Reversed.

Warner, Raudabaugh & Person, for appellants.

George Luton and William J. Branstrom, for appellee.

BIRD, J. This case was before this court on a prior occasion, and reversed because of the failure of the trial court to submit to the jury a certain question of fact. 178 Mich. 555 (146 N. W. 230). A retrial has been had, and it is here again for review. The main issue in the first trial was whether plaintiff should recover against defendants on a certain promissory note given by them for a Percheron stallion. The defendants resisted the payment on the ground that the plaintiff had not lived up to his warranty of the horse. The warranty was as follows:

"We guarantee the above named horse to be a reasonably sure foal-getter and transmitter of sixty per cent. of good producing mares owned by the above-named stockholders, provided he shall have plenty of exercise and proper feeding and grooming, care and handling, and in case he should not prove so, we agree

to replace him with another of the same breed and price, upon the delivery to us of the above named horse in as sound and good condition as he is at present."

The defendants offered testimony tending to show that the horse was sexually impotent when he was delivered to them; that they notified plaintiff of the fact, and demanded another horse; that later they returned the horse to him; but that he never replaced him with another, in accordance with the contract.

Plaintiff replied to these contentions by introducing both lay and expert testimony that, if the horse were sexually weak, he was made so by sickness, improper care and handling after he was purchased by defendants. The testimony on this question clearly made it one of fact.

Another contested question on the first trial was whether the redelivery of the horse to plaintiff was a valid delivery, under the contract, and this court held in its former opinion that the redelivery was a valid one. The only question then which was open on the first trial was whether the horse measured up to the warranty when he was delivered to defendants. This was likewise the issue on the second trial. The testimony on this issue was along the same lines on the second trial, but there was more of it bearing upon the defects of the horse and the causes which produced them. This issue was again one for the jury, and should have been submitted to them. They should have been instructed, in substance, that, if they found the horse was sexually what the contract of warranty represented he should be when delivered to defendants, and that his failure afterward to measure up to the warranty in that respect was due to his sickness and improper handling after the defendants received him, plaintiff was entitled to recover the amount of his notes. On the other hand, if they found the horse

was sexually defective when he was delivered to defendants, and therefore was not such a horse as plaintiff had agreed in his contract of warranty to furnish them, the plaintiff was not entitled to recover.

On the second trial the court was of the opinion that there had been no rescission of the contract by the defendants, and therefore directed a verdict for the plaintiff. While the record shows some talk about rescission, the real issue made by the defendants' testimony was whether plaintiff had lived up to his contract of warranty in furnishing the kind of horse he had agreed to furnish. The defendants, in fact, did not rely on a rescission. They relied on the contract. They insisted upon plaintiff making good his contract of warranty, and from their viewpoint the thing he had to do to "make good" was to furnish them another horse that would satisfy the terms of the warranty. This was the measure of damages agreed upon in the contract, and was therefore binding. *Canavan v. Neeld*, 189 Pa. 208 (42 Atl. 115); 35 Cyc. p. 633; *Black v. De Camp*, 78 Iowa, 718 (34 N. W. 625); *Monroe v. Hickox, Mull & Hill Co.*, 144 Mich. 30 (107 N. W. 719); *Twin City Creamery Co. v. Godfrey*, 176 Mich. 109 (142 N. W. 362, 50 L. R. A. [N. S.] 805).

For the failure of the trial court to submit this question to the jury, the judgment must be reversed, and a new trial ordered. The defendants will recover their costs.

STONE, C. J., and KUHN, OSTRANDER, MOORE, STEERE, and BROOKE, JJ., concurred. PERSON, J., did not sit.

*In re FOERSTER'S ESTATE.*GUMTOW *v.* JANKE.

1. WILLS—UNDUE INFLUENCE—INSTRUCTIONS TO JURY.

Where the court in a will contest charged the jury that if decedent did not voluntarily destroy the instrument, or if they were not satisfied he actually destroyed it, or if he did it upon a surrender of his own judgment and an abdication of his judgment to the people with whom he boarded, the instrument should be sustained, and on an examination of the evidence upon error the court found that there was no competent proof of the contention that contestant had unduly influenced him, *held*, that the instruction was erroneous, and the error was not cured by the subsequent instruction that there was no evidence of undue influence, which was clearly in conflict with the preceding instruction, and it would be assumed that if conflicting instructions were given the jury they might have followed the improper one.

2. SAME—REVOCATION—EVIDENCE.

Held, that in a previous opinion the legal phases of the case were fully considered by the Supreme Court and the law determined which should control the case, and the question of revocation was a question of fact, that the verdict was against the great weight of the evidence and a similar conclusion should be reached on the subsequent appeal. *In re Foerster's Estate*, 177 Mich. 574 (143 N. W. 616).

Error to Wayne; Hally, J. Submitted January 19, 1916. (Docket No. 30.) Decided December 21, 1916.

Emil Gumtow and others presented for probate the last will of August Foerster, deceased. Anna Janke and others contested the allowance of such instrument. From an order denying the petition, proponents appealed to the circuit court. Judgment for proponents. Contestant Janke brings error. Reversed.

Covert & Campbell, for appellant.

James H. Pound, for appellee.

BIRD, J. In this proceeding an attempt is made to probate an alleged lost or destroyed will of August Foerster, who was for many years a resident of Detroit. It is claimed that the will in question was made by him while he was in St. Mary's Hospital in August, 1910. Anna Janke, a sister of the deceased, and the other contestants, appear not to dispute the execution of this will, but resist the probating thereof on the ground that it was subsequently revoked by him by tearing and afterwards by burning.

The will was established in the trial court, and contestants have appealed. On a former trial the will was established, and upon an appeal to this court it was reversed on two grounds; namely, for failure of the trial court to instruct the jury that there was no evidence of undue influence upon the part of Anna Janke, and because the verdict of the jury was against the weight of the evidence upon the question whether testator had revoked the will in his lifetime. 177 Mich. 574 (143 N. W. 616). Upon a retrial the court was again requested to instruct the jury that there was no evidence in the case from which they could find that Anna Janke exercised any undue influence over her brother after he returned from the hospital. The court upon his own initiative charged the jury that:

"If you believe that August Foerster freely and voluntarily made the will offered in evidence, and you find from the evidence or its own construction that it bears evidence of being a fair will executed by a competent man, a man who understood what he was about, and who dictated this will, and if you find that he did not voluntarily destroy it, or if you are satisfied that he did actually destroy the said paper, or if you are not satisfied that he did actually destroy the said

paper, or if he did, he did it upon a surrender of his own judgment and an abdication to the people with whom he boarded, the contestants in this case, then you should sustain the will."

1. That part of the foregoing instruction which advised the jury they could sustain the will if the testator actually destroyed it "if he did it upon a surrender of his own judgment and an abdication to the people with whom he boarded" is complained of as error, as it left it open to the jury to find that Anna Janke, the contestant, had unduly influenced him with reference to its destruction. We have examined the testimony relied upon to show undue influence upon the part of Anna Janke, and we are unable to find that there is any evidence in the record to support the contention. The record bearing on this question is substantially the same as it was upon the former hearing in this court.

But it is suggested that by the following instruction the jury were informed that there was no evidence of undue influence by Anna Janke over her brother:

"I charge you that there is no evidence of undue influence, exercised upon the decedent by Anna Janke, his sister, after his return to her home from St. Mary's Hospital."

This instruction was clearly in conflict with the foregoing instruction, and the situation is thereby brought within the rule that where conflicting instructions are given, one proper, and the other erroneous, it will be presumed by the court that the jury may have followed the erroneous instruction. *Grand Rapids, etc., R. Co. v. Monroe*, 47 Mich. 152 (10 N. W. 179); *Madill v. Currie*, 168 Mich. 546 (134 N. W. 1004); *Lamb v. Township of Clam Lake*, 175 Mich. 77 (140 N. W. 1009); *Silverstone v. Assurance Corp.*, 176 Mich. 525 (142 N. W. 776).

2. Contestant contends that the trial court was in

error in refusing to direct a verdict on her claim that testator revoked the will in question. In the former opinion of this court the legal phases involved in that question were fully considered, and the law determined which should control the case. Applying its legal conclusions there reached, it was held that the evidence on the question of revocation presented a question of fact for the jury. But it was further held on a review of the testimony that the verdict was against the weight of the evidence. We are of the opinion that the same conclusions must be again reached on these questions, as a study of the present record does not reveal any material variation from the former one.

The judgment is reversed, and a new trial granted.

STONE, C. J., and KUHN, MOORE, STEERE, BROOKE, and PERSON, JJ., concurred. OSTRANDER, J., did not sit.

WILSON v. SAUBLE.

1. TAXATION—REDEMPTION—INVALID NOTICE.

The notice required by section 140 of the general tax law is intended by the statute to be given and signed by the owner of the tax title, who should state his post office address, so that the owner may be informed to whom he should pay the amount required for redemption, and where he can be reached by mail: signing by any one else than the owner is invalid. 3 Comp. Laws 1915, § 4138.

2. SAME—AMOUNT OF TAX—EXCESSIVE DEMAND—NOTICE.

Where defendant purchased a tax title of the county treasurer for 1905, of which the redemption period had not

expired, so that the demand to redeem from the tax was premature, nothing appearing on the notice, which required the owner to pay the tax of 1905, as well as other years named, to show whether the tax had been paid as a condition of purchase (in which case it would be rightly included), the notice was void because it named an excessive amount as a condition of redemption.

3. SAME—REDEEMABLE INTEREST.

Complainant, who bought the property of V., who had originally had a warranty deed made in 1904, and obtained a quitclaim to replace it five years later, after losing the original conveyance, had a redeemable interest.

Appeal from Genesee; Withey, J., presiding. Submitted January 12, 1916. (Docket No. 124.) Decided December 21, 1916.

Bill by Samuel J. Wilson against Charles Sauble to redeem from the sale of land delinquent for taxes. From a decree for complainant, defendant appeals. Affirmed.

McFarlan & Wilson, for complainant.

Daniel Heims and John H. Tyler, for defendant.

BIRD, J. Complainant claims to own in fee simple lot 19, block 20, of Oak Park subdivision of the city of Flint, and he seeks by this proceeding to redeem from certain tax sales for the years 1902, 1904, and 1905. The lot was conveyed to William C. Durant and J. Dallas Dort on August 7, 1901. From that date they appear to have been the grantees in the last recorded deed in the regular chain of title until May 21, 1909, when a deed was placed of record conveying the premises to Edwin Van Valkenburg, which deed purported to take the place of a lost deed made in December, 1904, but which was never recorded. The tax title for the year 1902 was purchased by Robert C. McKay, and he subsequently conveyed his interest to

William D. Bailey, who purchased the tax titles for the years 1904 and 1905. McKay, learning that Van Valkenburg owned the title, on the 28th day of August, 1907, served upon him the six months' notice to redeem for the taxes of 1902. Bailey afterwards on August 21, 1908, gave a like notice to Durant and Dort for the years 1902, 1904, and 1905. Defendant claims title through these tax sales, and he resists these proceedings upon the theory that the notices were valid, and that the owners failed to redeem within the statutory period, and that complainant has not sufficient interest in the premises to entitle him to redeem.

1. The point made against the notice served upon Van Valkenburg is that it was signed by Robert C. McKay, who had conveyed the premises to one William D. Bailey at the time the notice was served, and consequently was not then the owner of them. The chancellor was of the opinion that this fact invalidated the notice. Section 140 of the tax law (1 Comp. Laws 1915, § 4138) provides for the giving of the notice, and includes a form to be followed in the preparation of it. The provisions of that section contemplate that the notice shall be given and signed by the owner of the tax title, together with his post office address. The obvious purpose of this is that the owner of the premises may be advised to whom to pay the amount due thereon, and further, that he may be advised where he can reach him personally or by mail. It is true that payment may be made either to the owner of the tax title or to the register in chancery; but the owner has a right to elect to pay the owner of the tax title, and, if he does so elect, it is important that he should be in a position to receive payment and reconvey the premises. We agree with the chancellor that a notice signed by one other than the owner of the tax title falls short of complying with the statute.

2. Exception is taken to the notice which was served upon Durant and Dort, because it demanded the taxes for 1905 as well as those for 1902 and 1904. The premises had been sold for the taxes of 1905, but the equity of redemption had not yet expired; therefore the demand as to the 1905 tax was premature, and on this account it is claimed that the total amount claimed was excessive. The amount paid for each year's tax was carried out and placed in a column by itself, so that it could be determined from the face of the notice what amount was paid for each particular year.

It is argued in substance that, inasmuch as the amount paid for the taxes of 1905 was severable from the amounts paid for the other years, Durant and Dort might have paid or tendered the amount demanded less the taxes of 1905. This is perhaps so, but the difficulty is there was nothing upon the face of the notice to disclose whether the tax was paid as a condition of purchase. If it were so paid, it was properly included in the amount demanded. If it were not so purchased, the 1905 tax was improperly included in the notice. As a matter of fact, the record shows the title was purchased at the county treasurer's sale and was a voluntary one. We think the amount demanded under this notice was excessive, and therefore invalid under the authority of *Teal Lake Iron Mining Co. v. Olds*, 178 Mich. 335 (144 N. W. 845); *Closser v. McBride*, 182 Mich. 594 (148 N. W. 756).

3. Complainant's right to redeem is questioned because of a lack of interest in the premises. It appears to be conceded by complainant that Durant and Dort had title to the premises. It is shown by defendant that the premises were conveyed to Van Valkenburg in 1904 by warranty deed. Subsequently, and in 1909, a quitclaim deed was given by Durant and Dort to take the place of the warranty deed which was claimed

to be lost. It is further unquestioned that Van Valkenburg conveyed to Wilson, the complainant. These latter deeds were of record when these proceedings were begun. This would appear to give complainant the privilege of raising the questions involved here. *Mercer v. Stephens*, 185 Mich. 290 (151 N. W. 1032).

The decree of the lower court will be affirmed, with costs to complainant.

STONE, C. J., and KUHN, MOORE, STEERE, BROOKE, and PERSON, JJ., concurred. OSTRANDER, J., did not sit.

PAUL v. GRAHAM.

1. FRAUDS, STATUTE OF — BROKERS — WRITING — MEMORANDUM — PROMISE TO PAY COMMISSIONS.

Under the amendment of Act No. 238, Pub. Acts 1913, avoiding any agreement to pay a commission on the sale of real estate unless in writing, correspondence in which it was stated that a note from plaintiff to defendants might be paid out of commissions earned in selling lands in Florida did not satisfy the statute of frauds, since it did not show all the terms of the contract. 3 Comp. Laws 1915, § 11981.

2. SAME—WRITTEN CONTRACTS.

A memorandum, to be sufficient, must be complete in itself and leave nothing in parol. In an agreement to pay broker's commissions the time of payment, rate of commission, and time of termination, etc., are essential elements which should be mentioned in the contract.

3. SAME—VALUE OF SERVICES—QUANTUM MERUIT.

No recovery is allowed on the *quantum meruit* for the value

of broker's services, in the absence of a written agreement, as such a holding would deprive the statute of its force.

Error to Calhoun; North, J. Submitted April 6, 1916. (Docket No. 36.) Decided December 21, 1916.

Assumpsit by H. M. Paul against William B. Graham, C. W. Shriver, George W. Dunham, and E. C. Humpidge, copartners as Graham & Shriver Company, for commissions on the sale of real estate. Judgment for plaintiff. Defendants bring error. Reversed, and no new trial ordered.

W. S. Powers, for appellants.

Stewart & Jacobs, for appellee.

BIRD, J. The defendants were owners of land near Ft. Myers in the State of Florida, and were engaged in selling the same in small tracts of five acres and upwards, upon contracts containing provisions for developing the land by planting grape fruit and orange groves, and caring for them for a stated period. Some time between the 25th day of August and the 6th day of September, 1913, defendants made a verbal agreement with the plaintiff to assist in selling the tracts on commission. The terms of the verbal agreement are in dispute, both as to the amount of the commission to be allowed and the territory in which plaintiff should be entitled to work. The parties worked under this oral agreement until February 9, 1914, when a new agreement was made in writing. Plaintiff claims there is a balance due him under the oral agreement, and this suit was instituted to recover it. Defendants raised the point that the oral agreement for commission could not be enforced, because it was within the recent amendment to the statute of frauds (Act No. 238 of the Public Acts of 1913, 3 Comp. Laws 1915,

§ 11981), which requires such agreements to be in writing. The trial court was of the opinion that certain letters written by defendants, and certain statements of account which were rendered to plaintiff, took the agreement outside of the statute. The corrected statements credit plaintiff with a commission of \$20 per acre, whereas he contends he was to receive \$25. One letter advises him that he is credited with \$10 on his note and \$10 in cash. The letters were written and the statements rendered after the services were performed. The letter which is relied on by counsel to take the agreement out of the statute reads:

"BATTLE CREEK, MICH., Feb. 2, 1914.

"It is agreed between the Graham-Shriver Company and H. M. Paul, that the note bearing even date herewith and attached hereto, is to be paid from commissions earned by H. M. Paul in selling Florida lands of the Graham-Shriver Company.

[Signed] "GRAHAM-SHRIVER COMPANY,

"Per GEORGE DUNN.

"H. M. PAUL."

1. Counsel urge that this letter shows the fact that commissions were to be paid to plaintiff, and therefore is sufficient to satisfy the statute, and he quotes similar provisions from the statutes of other States, and construction of the several courts thereon in support of his contention. This amendment was ingrafted onto section 9515 of the Compiled Laws of 1897, to stand as subdivision 5, and reads as follows:

"Every agreement, promise or contract to pay any commission for or upon the sale of any interest in real estate."

In the early case of *Hall v. Soule*, 11 Mich. 494, it was said:

"A promise in writing to pay the debt of another is not valid unless it show the whole terms of the contract; no resort can be had to parol evidence to add to them."

This holding was afterwards approved in *Palmer v. Mill Co.*, 32 Mich. 274; *James v. Muir*, 33 Mich. 223; *McElroy v. Buck*, 35 Mich. 434. In *Gault v. Stormont*, 51 Mich. 636 (17 N. W. 214), this rule was restated as follows:

"A memorandum to be sufficient, * * * must be complete in itself, and leave nothing to rest in parol."

Again in *Francis v. Barry*, 69 Mich. 313 (37 N. W. 353), it was said:

"A complete and binding contract may be created by letters or other writings relating to one connected transaction, if, without the aid of parol testimony, the parties, the subject-matter, and the terms of the contract may be collected."

And so far as we are advised, this rule has never been departed from in the subsequent decisions of this court. The foregoing letter, tested by this rule, is found wanting. The letter is silent as to the territory in which plaintiff shall operate. There is nothing to show when the commissions are payable; whether they are payable when the sale is made, or when the vendee makes final payment on his contract. There is nothing to show the rate of commission agreed upon for the sale of the tracts, except the letters and statements of account, and these are asserted by plaintiff to be incorrect, and by defendants to have been made in the nature of a compromise. And there is nothing to show how long the contract should continue. These are important elements, and if we are to overlook them and say that proof of the bare fact that some commission was to be paid is a compliance with the statute, and permit parol proof to make a completed contract, the effect which was obviously intended by the legislature is set at naught, and the controversies which the passage of the act was sought to avoid will still be with us. We think this subdivision 5 should be subject to

the same construction that has been given the other subdivisions so far as it is applicable.

2. Plaintiff takes the further ground that if the agreement shall be adjudged to be within the statute, then he is entitled to have the judgment affirmed under his count on the *quantum meruit*. To sustain that count he showed by competent testimony what the value of plaintiff's services was for selling the tracts. It has been the rule of this court to permit recoveries for services actually performed under contracts void under the statute of frauds, either at the contract price or under a *quantum meruit*. *Fuller v. Rice*, 52 Mich. 435 (18 N. W. 204); *Moore v. Nason*, 48 Mich. 300 (12 N. W. 162); *Smith v. Manufacturing Co.*, 175 Mich. 371 (141 N. W. 563); *Id.*, 185 Mich. 313 (151 N. W. 1025). If this rule is to be made applicable to this section of the statute of frauds, it would practically nullify the effect of the statute. Demands for commissions by real estate brokers are not usually made or pressed until the contract is performed. This being so, a recovery could be had, in nearly every instance, either at the contract price or under the *quantum meruit*. In order to give the act the effect which the legislature evidently intended it should have, we have decided to hold that no recovery can be had under this section unless the agreement therefor is in writing. This is in accord with the holding of other courts which have construed similar statutes. *Leimbach v. Regner*, 70 N. J. Law, 608 (57 Atl. 138); *Blair v. Austin*, 71 Neb. 401 (98 N. W. 1040); *McCarthy v. Loupe*, 62 Cal. 299.

In view of this conclusion, the judgment of the trial court must be reversed, and no new trial ordered.

STONE, C. J., and KUHN, OSTRANDER, MOORE, STEERE, BROOKE, and PERSON, JJ., concurred.

JOHNSON v. GRATIOT COUNTY STATE BANK.

1. **BANKRUPTCY—BANKS AND BANKING—DEPOSITS—PREFERENCES.**

Where the directors of a corporation had indorsed notes to several banks and, after finding their corporation was hopelessly insolvent, tried to realize on the quick assets to pay off the notes, deposits made with this purpose in view and to the knowledge of defendant, could not be retained and set off by the bank against the insolvent's notes, which proceeding would amount to a preference, in violation of 30 U. S. Stat. 565, U. S. Comp. Stat. 1913, § 9652.

2. **SAME—RES JUDICATA—ACT OF BANKRUPTCY.**

The decision of the referee, confirmed by the court, in a bankruptcy proceeding contested by the bankrupt, that the same was insolvent and had made preferential payments, is conclusive and cannot be collaterally attacked by creditors of the bankrupt or by his trustee.

3. **SAME—RECORD OF PROCEEDINGS—JURY—CHARGE.**

The court did not err in permitting part of the bankruptcy proceedings to be read before the jury, later instructing them that the subject matter complained about was governed by the record and it could not be taken into consideration except as the court advised them.

4. **SAME—SCHEDULES—PREFERENCE—EVIDENCE.**

Evidence that the assets of the bankrupt had been materially reduced by damage caused by a cyclone a few months before the adjudication of bankruptcy was properly excluded by the court, as the question of solvency was foreclosed by the judgment in bankruptcy, and the trial court so ruled.

Error to Gratiot; Searl, J. Submitted April 20, 1916. (Docket No. 76.) Decided December 21, 1916.

Assumpsit by D. Lloyd Johnson, trustee in bankruptcy of the St. Louis Chemical Company, against the Gratiot County State Bank for money had and received. Judgment for plaintiff. Defendant brings error. Affirmed.

George P. Stone and L. B. McArthur, for appellant.

Lyon & Moinet (William A. Bahlke, of counsel), for appellee.

BIRD, J. A petition was filed in the Federal court on the 25th day of June, 1909, against the St. Louis Chemical Company, by certain of its creditors, praying to have it adjudged a bankrupt. Subsequently the company was adjudged a bankrupt and a trustee appointed. The company became indebted to defendant bank on a promissory note for \$5,000, in July, 1907, and the same was renewed from time to time until February 5, 1909, when the company commenced to make payments thereon. From that date up to March 31, 1909, it made several payments aggregating \$4,300. It is to recover this sum that the trustee filed this suit, it being his claim that the payments were made within four months of the bankruptcy proceedings and while the company was insolvent.

1. The principal error relied upon by the bank was the court's refusal to instruct the jury that under the proofs defendant had a right to set off the amount due on its note against the chemical company's deposit.

It was the claim of defendant that deposits were made by the company in its bank from time to time, in the usual course of business, and that by reason thereof the relation of debtor and creditor existed, and that after the note became due it had a lawful right under the law to set it off against the deposit, and it is contended that the bankruptcy laws, in express terms, authorize this to be done. The particular section referred to is section 68a of the bankruptcy law (30 U. S. Stat. 565, U. S. Comp. Stat. 1913, § 9652), and it provides in part that:

"In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off

against the other, and the balance only shall be allowed or paid."

Plaintiff, in answer to this contention, concedes that, if the relation existing between defendant and the company had been the ordinary relation existing between banker and depositor, its conclusion would be sound. But it is the contention of plaintiff that the deposits made in defendant bank and the checks drawn thereon in payment of defendant's note were done in pursuance of a fraudulent scheme on the part of the directors of the company, after they knew the company was insolvent, to convert its quick assets into money and pay off, before the crash came, certain notes, including the one in question, which had been indorsed by two of the directors of the company; that the carrying out of this scheme within four months from the date of the bankruptcy proceedings, and while the company was insolvent, created an unlawful preference in behalf of the bank and was in fraud of its other creditors. It was further claimed that the defendant had notice that the company was insolvent and had knowledge of the unlawful scheme when the payments were made.

If it can be said that these claims were supported by competent proof, the trial court was justified in disposing of the matter as he did. The jury were instructed in part that:

"Now, when the money was placed in the bank, the bank would owe the money to the chemical company. The chemical company owed a note to the bank. If the bank received this money in good faith and without knowledge, such knowledge as I have defined to you in my charge here, of the fraudulent intent upon the part of the chemical company, then it would have the right to offset its note against the money so deposited, and, if the payments were received by the checks for the purpose of making payments upon the note, the bank, under those circumstances, could keep

the money. But if it had notice or knowledge, or if in the exercise of bad faith it abstained from learning those things, when it might, by the exercise of reasonable diligence, and would have learned the fact that the money was placed there in pursuance of that plan of the chemical company to pay off certain of its directors and those who were indorsers upon its paper, then the bank could not keep the money and could not offset it against this note, and would have to pay it back to the trustee and receive its distributive share along with the other directors when it proved its claim."

The testimony tended to show that the directors were indorsers on notes to several banks, and, when it became obvious that the company could not weather the storm, they arranged to realize on the quick assets of the company and pay off these notes, and that during the time they were making these payments the company was insolvent. Testimony was admitted tending to show that notice of these facts was brought home to the defendant. If the jury believed this testimony, the defendant was not entitled to retain the payments because they were received in violation of the provision of the bankruptcy law against preferences. Section 60*b* of the bankruptcy law.

2. But it is strenuously insisted that there was no competent evidence to establish the fact that the company was insolvent for four months prior to the date of the filing of the petition, and that the directors had knowledge of it. To establish these facts the bankruptcy proceedings were received in evidence. The petition charged that the company was insolvent and had been for four months prior thereto, and that it had created preferences in behalf of certain of its creditors, by making payments on the notes heretofore referred to, including the one in question. The sworn answer denied these allegations. A hearing was had. The referee found the allegations to be established, and the

district court later confirmed the finding. The trial court held, and so charged the jury, that the bankruptcy proceedings were conclusive as to those facts.

Defendant insists that the adjudication settled nothing beyond the fact of insolvency of the company at the date of the filing of the petition. The rule appears to be otherwise where the proceedings are involuntary and are contested. In such cases the finding of the referee, when confirmed by the court, is final and conclusive in any collateral inquiry and is binding on the creditors whether they appear or not. This appears to be placed upon the ground that the proceedings are in a sense *in rem*, and the law makes all creditors parties to the proceeding. *Bear v. Chase*, 99 Fed. 920 (40 C. C. A. 182); *In re American Brewing Co.*, 112 Fed. 752 (50 C. C. A. 517); *Hackney v. Raymond Bros.-Clarke Co.*, 68 Neb. 633 (99 N. W. 675); *In re Hecox*, 164 Fed. 823 (90 C. C. A. 627); *Cook v. Robinson*, 194 Fed. 785 (114 C. C. A. 505).

In the last-named case it was said:

"Now, the creditors of the bankrupt became parties to the proceeding to have him so adjudged and are precluded by the order of adjudication in so far at least as the adjudication determines the insolvency of the debtor, and that he has committed an act of bankruptcy within four months of the filing of the petition. In *Bear v. Chase*, 99 Fed. 920, 924 (40 C. C. A. 182, 186), a case bearing near analogy upon the facts to the case at bar, the circuit court of appeals for the fourth circuit expressly held that:

"Upon the adjudication of the bankrupt, all creditors became parties to the bankruptcy proceedings by operation of law, and particularly these creditors by whose acts the bankruptcy was caused."

"Here, as there, the person running the attachment is a creditor of the bankrupt, and it was he who through the attachment precipitated the proceeding in bankruptcy. So in *Hackney v. Raymond Bros.-Clarke Co.*, 13 Am. Bankr. Rep. 164, 170 (68 Neb. 633, 99 N.

W. 675), which was a contest between a trustee in bankruptcy and one sought to be charged as a creditor having received unlawful preference, the court gave a like rendering of the law, as follows:

"The defendants in the action are not third parties in the sense that they are in no wise connected with the bankruptcy proceedings, because, for the purpose of these controversies, and in determining their liability, they are sought to be charged as creditors of the bankrupt having received unlawful preferences, and for such purposes were necessarily parties to the bankruptcy proceedings.'"

Again in *Re Hecox, supra*, the court observed that:

"The radical error in the ruling of the district court and the vice in the position assumed by counsel for the receiver before this court consist in undertaking collaterally to controvert the ground of adjudication in bankruptcy. That adjudication determined that the bankrupt was insolvent and while insolvent, within four months of the filing of the petition in involuntary bankruptcy, and because of its insolvency, a receiver had been put in charge of its property by order of the State court. By the amendment to the bankrupt act of July 1, 1898 (30 U. S. Stat. chap. 541, § 3a [4]), by Act Feb. 5, 1903 (32 U. S. Stat. chap. 487, § 2), it is declared to be an act of bankruptcy 'because of insolvency a receiver or trustee has been put in charge of his property under the laws of a State, of a territory, or of the United States.' Until avoided in a direct proceeding therefor, that adjudication was binding and conclusive on the bankrupt and creditors, as much so as a judgment, *inter partes*, on due hearing in a court of competent jurisdiction. *In re American Brewing Company*, 112 Fed. 752 (50 C. C. A. 517); *In re Knight*, 125 Fed. 35; *In re First Nat. Bank*, 152 Fed. 65 (81 C. C. A. 260, 11 Am. & Eng. Ann. Cas. 355)."

We think the weight of authority sustains the contention of plaintiff's counsel and the position of the court that the bankruptcy proceedings were conclusive in these proceedings upon the questions of the insolvency of the company on the date of filing its

petition and for four months prior thereto, and that the directors had knowledge thereof.

3. The plaintiff was permitted against objection to read the bankruptcy proceedings in the presence of the jury. It is contended that this was harmful to defendant on the issue which was submitted to the jury. The bankruptcy proceedings were admissible to furnish a basis for the charge of the court that on the day of the filing of the petition the company was insolvent and had been so for four months prior thereto, and that the directors had knowledge thereof. These were material things for the plaintiff to show. We do not, however, see what necessity there was for reading them into the record in the presence of the jury. If it resulted in any harm to defendant's case, we think it was cured by the following explanation of the court:

"Certain issues of this case that the court was obliged to receive testimony upon, and a large amount of documentary testimony of what took place in the United States court, was offered and received by the court, but now at the conclusion of the case I determine some of those questions for you, and you need not consider any of the documentary evidence so far as it came from the United States court except as I shall permit you to do so later on in this charge."

4. After the schedules annexed to the petition had been received in evidence showing the assets of the company, the defendant offered testimony tending to show that the assets were materially reduced as the result of a cyclone which passed over the company's plant a few months prior to the adjudication. The court rejected this testimony on the ground that the insolvency of the company was foreclosed by the bankruptcy proceedings. Counsel bases his argument on the assumption that the schedules were admitted on the question of solvency. In this he is in error, as counsel for plaintiff stated at the time that they were

not offered on the question of solvency, as it was his contention that that question was determined conclusively by the bankruptcy proceedings.

The case seems to have been properly submitted to the jury, and their finding is supported by the testimony.

We are of the opinion that the judgment should be affirmed.

STONE, C. J., and KUHN, OSTRANDER, MOORE, STEERE, BROOKE, and PERSON, JJ., concurred.

JOHN F. NOUD & CO. *v.* STEDMAN.

1. MECHANIC'S LIEN—DATE—DEFECTIVE CLAIM.

A claim of lien for a contractor's work installing a heating apparatus in a house need not state the date of commencing performance definitely if it states the last date sufficiently to comply with the statute.

2. SAME—NAME OF OWNER, ETC.

But it must state, as required by statute, the name of owner, part owner, or lessee, if known. A failure to observe this requirement is fatal.

3. SAME—SUPPLEMENTAL EVIDENCE.

The claim on its face must show the essentials without extraneous aid; evidence to supplement it, if deficient in this particular, will not be admitted.

Appeal from Van Buren; Bridgman, J., presiding.
Submitted April 11, 1916. (Docket No. 101.) Decided
December 21, 1916.

Bill by the John F. Noud Company against Alva Stedman, Ellen R. Avery, mortgagee, and others, to enforce a mechanic's lien. On petition R. R. Brenner was allowed to intervene, claiming a lien. From the decree rendered, defendant Brenner appeals. Affirmed.

Thomas J. Cavanaugh, for appellant.

David Anderson, for defendant Avery.

BIRD, J. The purpose of these proceedings is to enforce a mechanic's lien on certain premises in South Haven. Complainant made parties defendant the owners, mortgagee, and several other persons claiming statutory liens for labor and material. Defendant Brenner petitioned for and was given the right to intervene. He claimed a lien as contractor for the heating apparatus which he installed in the building. A hearing was had on the several claims, and the chancellor allowed some of them, but disallowed others, and among those disallowed was the claim of Brenner. Defendants Stedman, the owners of the premises, did not defend. Ellen R. Avery, the mortgagee, made the defence and is appellee herein. Defendant Brenner is the sole appellant.

1. Among the reasons given by the chancellor for disallowing Brenner's claim was that the claim of lien filed with the register of deeds did not definitely set forth when the labor and materials were furnished. That part of his claim appears to be set forth as follows:

"That he entered upon the performance of his contract on or about the 19th day of December, 1911, and the last thereon on the 17th day of December, 1912."

Counsel for the mortgagee makes the point that this statement is not sufficiently definite to satisfy the holding in *Godfrey Lumber Co. v. Kline*, 167 Mich. 629

(133 N. W. 528), where similar language was held insufficient. It will be noted, however, that in that case both dates were alleged as being "on or about," whereas in the present case the last date is definite. The last date is the more important of the two, because from the last one it is determined whether the claim for a lien was filed within the statutory period of 60 days. Where the last date is stated definitely, we do not think the claim should be declared fatally defective because the first date is stated too generally. For this reason we think it is quite obvious that, had this distinguishing feature been present in the case of *Godfrey Lumber Co. v. Kline*, the holding in that case would have been different.

2. A second reason given by the chancellor for holding the notice defective was that it failed to state the name of the "owner, part owner, and lessee, if known." This is one of the statutory requirements, and a failure to observe it is fatal and will not confer jurisdiction. *Waters v. Johnston*, 134 Mich. 436 (96 N. W. 504).

An attempt is made to supply this omission by the fact that attached to and made a part of the claim of lien was a copy of the contract made between the Stedmans and Brenner for installing the heating plant. The most that can be claimed for this is that it showed that Stedman & Stedman contracted with Brenner to install the plant, but no language is used therein showing whether they did so as owners, lessees, or tenants. The pleadings are also invoked to aid in this respect. These are of no avail, because the claim on its face should show the statutory essentials without the aid of extrinsic evidence. *Godfrey Lumber Co. v. Kline*, *supra*. The failure of appellant to observe the statutory requirement in this respect rendered his claim of lien invalid, and the chancellor was right in refusing to enforce it.

It will be unnecessary to discuss the other questions raised.

The decree is affirmed. Defendant Avery will recover her costs against the defendant Brenner.

STONE, C. J., and KUHN, OSTRANDER, MOORE, STEERE, BROOKE, and PERSON, JJ., concurred.

LIEBLEIN v. GEORGE.

1. BANKRUPTCY—PROMISE TO PREFER—FRAUD.

Plaintiff, a creditor, who agreed with a bankrupt to indorse the latter's note for enough to cover a proposed settlement with creditors, if the insolvent would pay his claim in full, could not recover on the contract, which is of a class declared fraudulent and void by the bankruptcy act.

2. SAME—COMPOSITION.

In the absence of a new consideration the promise was void, being based on a mere assurance of payment.

Error to Houghton, O'Brien, J. Submitted April 14, 1916. (Docket No. 136.) Decided December 21, 1916.

Assumpsit by Edward M. Lieblein against Elias George for goods sold and delivered. Judgment for defendant on a directed verdict. Plaintiff brings error. Affirmed.

Galbraith & McCormack, for appellant.

Burritt & Burritt, for appellee.

BIRD, J. Plaintiff is a wholesaler of groceries in the city of Hancock. Defendant is engaged in the retail grocery trade at Houghton. In January, 1911, defendant was declared a bankrupt upon his own petition. Soon thereafter he went to plaintiff, with whom he had been dealing for several years, and said to him he thought he could make a good settlement with his creditors if he could secure the money to pay them; that he needed \$4,700. He proposed to plaintiff that if he would advance it, or aid him in getting it, he would pay him his claim in full, which amounted to \$774.32. Plaintiff consented, and indorsed his note, and it was discounted at one of the banks in Hancock. A composition was then arranged by defendant with his creditors of 20 cents on the dollar, and he was subsequently discharged. Afterward defendant paid his note at the bank, but refused to pay plaintiff's claim in full, as he had agreed. Plaintiff received \$154.86, being the 20 per cent. paid him on the composition, which still left a balance of \$619.46, and he brought this suit in assumpsit to enforce the payment thereof.

Defendant pleaded the general issue, and gave notice of his discharge in bankruptcy. At the conclusion of the plaintiff's testimony the trial court was of the opinion that the agreement was one providing for a preference in favor of plaintiff as a creditor, and therefore void, and upon motion a verdict was directed for the defendant. The question presented is whether the view of the trial court was the correct one.

That a preference given by a debtor to one of his creditors is fraudulent and void as to other creditors under the bankruptcy act is not controverted; neither is there any contention over the proposition that an agreement to give a preference is void, and will not be enforced by the courts. But counsel for plaintiff seek to avoid the application of these rules on the ground that the defendant promised to pay plaintiff's

claim in full after the composition was consummated, as well as before, and it is argued that defendant's subsequent promise brings the case within the ruling of *Craig v. Seitz*, 63 Mich. 729 (30 N. W. 350), wherein it is said:

"While the effect of the discharge is to suspend the right of action, the debt remains, and the moral obligation to pay it forms a sufficient consideration for the promise to make such payment."

The distinguishing feature of this case from the present one is that in the case cited the consideration for the promise was in no wise tainted with fraud, whereas in the present one the defendant's promise before the composition was consummated to pay plaintiff's claim in full was fraudulent and void as to other creditors. *In re Chaplin*, 115 Fed. 163; *McCormick v. Solinsky*, 152 Fed. 984 (82 C. C. A. 134); *Tinker v. Hurst*, 70 Mich. 159 (38 N. W. 16, 14 Am. St. Rep. 482). The last case cited is very similar to the present one on the facts, although counsel point out the distinction that in *Tinker v. Hurst* it was shown that the creditor would not agree to the composition until the debtor would agree to pay his claim in full, while in the present case no such demand was made. While the proposition came from the defendant, it appears that plaintiff did not consent to the agreement for a composition until after the proposition had been made, and agreed to by him, and therefore it does not appear to what extent the agreement actuated him in his subsequent conduct. Had it not been for the promise to pay his claim in full, plaintiff might have opposed the composition. He was dealing in the same kind of merchandise, and knew what the assets were worth, and was doubtless well qualified to judge as to whether the offer was a fair one. The first promise is within the ruling of *Tinker v. Hurst*.

Counsel argue that no fraud was shown, that plain-

tiff did no wrong in aiding defendant to secure funds with which to settle with his creditors, and they complain of the court for characterizing plaintiff's act as a legal fraud. When defendant offered to pay plaintiff's claim in full, on certain conditions, and plaintiff consented thereto, they made an agreement which, if carried out, would have been in violation of the bankruptcy laws. The policy of the bankruptcy law is to have all creditors of the same class treated alike, and in order to enforce this policy it makes certain acts fraudulent which otherwise would be innocent.

The final question is whether the subsequent promise of defendant will support the action. If it were an independent promise, made after the composition had been effected, without reference to his former promise, it might be construed as valid under *Craig v. Seitz, supra*; but if it were an attempt to renew or revive the former agreement, with no other or further consideration, it is burdened with the same infirmity as the first. *Tinker v. Hurst, supra*. We are of the opinion that it was the latter. When defendant was about to renew his note at the bank, he was asked by plaintiff to include therein the amount coming to him. He refused, but again promised he would pay it after he had paid the note. This simply amounted to a reinsurance that he would do as he had previously agreed, and so far as the record shows it appears to have been based upon the same consideration as the first promise.

We think the verdict was properly directed, and the judgment must be affirmed.

STONE, C. J., and KUHN, OSTRANDER, MOORE, STEERE, BROOKE, and PERSON, JJ., concurred.

DETROIT UNITED RAILWAY v. CITY OF PONTIAC.**1. STREET RAILWAYS—FRANCHISE—EMINENT DOMAIN—INSTRUCTIONS.**

Plaintiff owned and controlled a franchise to operate electric cars on certain streets of defendant city, which refused to grant a petition for leave to build a passing track 300 feet long on West Huron street between State avenue and Franklin boulevard. In the franchise granted to plaintiff railway company it was authorized to lay single or double tracks on this and other streets with "all necessary and convenient tracks for turnouts, side tracks, switches," etc. The defendant opposed the location of the switch on the ground that its location would endanger the lives and limbs of school children, because it was purposed to construct the turnout immediately in front of city school buildings: the municipal defendant further offered its consent to a location some distance away from the objectionable place. The jury were instructed that the question for them to determine was whether the inconvenience to the public existed as claimed, because it was dangerous to school children; and, if so, whether the benefits to the company outweighed by a preponderance of the evidence the dangers to school children and to travelers on the streets; that, in order to answer the question in the affirmative, they must find by a fair preponderance of the evidence that the benefits and additional use of the company are such reasonably necessary ones as fairly outweigh the dangers and inconveniences, if any, claimed by the city. *Held*, that the charge was not subject to criticism and it was a proper sequence of the preceding instructions to the jury.¹

2. SAME—EVIDENCE—STREETS.

It was not harmful for the court to grant a request to charge of the plaintiff limited by the court's suggestion that if the jury could see that it was applicable they

¹On power of municipality to prevent laying an additional track under a franchise originally granting the right to lay double tracks, see note in 20 L. R. A. 126; 36 L. R. A. (N. S.) 850.

might use it, to the effect that the street cars of plaintiff had the same right to travel over the street as other vehicles.

3. SAME—WITNESSES—WEIGHT OF EVIDENCE.

Nor did the court commit reversible error in advising the jury that the testimony given by employees of the railway company was not to be given more weight on the question of safety of the school children than the statements of any other witnesses.

4. SAME—JURY—INSTRUCTIONS.

Held, that the charge of the court was not so argumentative as to prejudice the rights of plaintiff, and, though open to some criticism, fairly presented the issue to the jury.

Certiorari to Oakland; Smith, J. Submitted April 17, 1916. (Docket No. 52.) Decided December 21, 1916.

Mandamus by the Detroit United Railway against the city of Pontiac to compel respondent to grant permission to lay certain tracks in respondent's street. On the determination of issues of facts framed by stipulation and submitted to a jury, the writ was denied, and relator brings certiorari. Affirmed.

James H. Lynch, for relator.

Andrew L. Moore, City Attorney (*Aaron Perry*, of counsel), for respondent.

STEERE, J. Plaintiff, being the owner of a franchise to operate electric cars on certain of defendant's streets, petitioned the city commission for permission to construct a passing track, 300 feet long, on Huron street west, between State avenue and Franklin boulevard. The petition was denied by the commission, whereupon plaintiff petitioned the circuit court for a writ of mandamus to compel it to grant such permission. An order to show cause was issued and defend-

ant made answer thereto. Following this an issue was framed and the question of necessity for the side track was submitted by stipulation to a jury. They found it was not a necessity, and the writ was denied. We are now asked to review these proceedings upon certiorari.

Plaintiff's franchise authorized it to lay a single or double track on certain streets in the city of Pontiac, including Huron street west, "with all necessary and convenient tracks for turnouts, side tracks, switches," etc. Taking this as a basis of plaintiff's rights an issue was framed and submitted to the jury, as follows:

"Is the proposed side track asked for in this case on Huron street west, in said city between State avenue and Franklin boulevard, necessary and convenient?"

The plaintiff alleged in its petition and argued to the jury that the passing track was necessary to enable it to give adequate service to and from the lakes lying nearby, and to the residents in the western part of the city, on account of the greatly increased traffic to those locations within recent years.

The city commission opposed the location of the switch between State avenue and Franklin boulevard, for the reason that it would locate it immediately in front of its school buildings, and would thereby endanger the lives and limbs of several hundred school children, and further that a passing track at that point on a 35-foot pavement would be a menace to public travel thereon. It appeared that the commission did not oppose the construction of a passing switch (although it denied the necessity therefor), but opposed its location at the point requested, and offered, before the proceedings were begun, to permit plaintiff to locate it farther west and beyond the school buildings on said street.

All of the assignments of error relate to the charge of the court.

1. The jury were instructed that:

"Now, there is no dispute but that the proposed siding would be of some use to the company and more convenient, if that was the only question involved, there would be no need of your services here for four days, for the court would have been obliged to dispose of it long ago in favor of the company. The precise question is: Are there inconveniences to the public in locating the siding and switch points in that locality, as claimed by the city authorities, are they dangerous to school children involved, as claimed by the city?"

After so doing counsel claims it was error to instruct them as follows:

"If they are, do the benefits to the company outweigh by a preponderance of the evidence, the dangers to the school children, and to travelers on the streets, for, before you can properly answer the question 'Yes,' you must find, by a fair preponderance of the evidence, that the benefits and additional use of the company are such reasonably necessary ones as fairly outweigh the dangers and inconveniences, if any, claimed by the city."

The portion of the charge objected to appears to be a natural sequence of the portion which preceded it. If it were competent to show the convenience or inconvenience to the public and the danger to the school children which the proposed side track would cause, it was proper to use them in measuring the necessity therefor.

3. Plaintiff requested the instruction that:

"Some evidence has been introduced upon the part of the city tending to show that Huron street west has a largely increased number of automobiles since the paving was laid. In that connection I say to you that the automobiles have no superior right on Huron street west over the cars of the Detroit United Railway Company. Under the laws of this State the grant and the authority given by the ordinance referred to, the cars of the Detroit United Railway have the same right to travel over West Huron street as have automobiles or any other vehicles."

This request was given and followed by a statement that the court was unable to see how the request was applicable, but if the jury could see any application thereof to the issue they could apply it. The court then proceeded to restate the issue. We find no reversible error in the suggestion of the court.

4. In this assignment plaintiff complains of an instruction in which the court advised the jury that they were to take the law from the court and not from counsel on either side. He called their attention to the fact that all the testimony offered by plaintiff had been admitted, and that their attention had been called to all the things requested by plaintiff when they were viewing the premises. He then took issue with plaintiff's counsel upon certain propositions of law which he had argued in their presence on the previous day. Inasmuch as counsel does not point out specifically the error of which he complains, we shall refrain from considering it.

5. In response to plaintiff's contention the jury were instructed that:

"Another proposition: The statement of counsel, yesterday, in his request and his argument as to the weight to be given to the judgment of the employees of the road. That, because of their superior knowledge, their word should locate the switch. Now, I am willing to concede, and do concede, that upon mere matters of operation, as to what would be convenient and useful to the company, and how its cars could be expedited, and how the time could be kept regular their superior knowledge would give to their testimony more weight than other."

The court then added the following comment:

"But when it comes to a question of whether it will inconvenience travel on that street, as to whether it will injure the safety of the children in the schools, and as to whether the city had the right to narrow that street or not, their testimony is of no more value than anybody else's."

This observation of the court is not claimed to be at variance with the fact. We think the propriety of adding the comment was entirely one of discretion with the trial court.

7. This assignment has reference to a portion of the charge which covers two pages of the brief, and counsel has criticized only one statement therein, and that was the court's definition of the word "necessity." Both counsel argue that question, and there appears to be no disagreement between them as counsel for plaintiff announces in his reply brief. The court seems to have been in accord with them, and therefore it is unnecessary to consider it.

There is some general complaint running through counsel's brief in connection with these assignments that the court made statements that were not justified by the record, and that his charge was argumentative. We think it is true that some things were stated by the court which might have been properly omitted. This was quite likely due to the fact that court, counsel, and jury were all familiar with the *locus in quo*. And in that portion of the charge wherein the court disagreed with counsel's legal propositions, his language seems to be somewhat argumentative, but we are unable to say that there was any such impropriety either in his statements or in his charge as to amount to reversible error. The real issue was a simple one. Considerable testimony was taken bearing thereon, and the jury were given the proper test for determining it.

We think the conclusion of the jury is supported by the evidence, and that the order of the trial court should be affirmed, with costs to defendant.

STONE, C. J. and KUHN, OSTRANDER, MOORE, BROOKE, and PERSON, JJ., concurred. BIRD, J., did not sit.

DETROIT CAVALRY *v.* RANNEY.

1. VENDOR AND PURCHASER—JOINT TENANCY—ASSIGNMENT.

An assignment of all the interest of one of several joint owners or vendees to another interested, reciting the existence of an indebtedness, and providing that the property be platted and sold at the best obtainable price, passed an equitable title to the real estate, and the assignor retained no interest under the land contract.

2. SAME—EQUITY—CLEAN HANDS.

It was, however, an untenable objection that complainant did not come into court with clean hands, because it had violated certain building restrictions on neighboring lots, which were subject in the contract only to the limitation that no building should be erected thereon nearer than 20 feet from the street line, and which did not appear to have been violated.

Appeal from Wayne; Hally, J. Submitted April 10, 1916. (Docket No. 51.) Decided December 21, 1916.

Bill by the Detroit Cavalry against Frederick T. Ranney, the Whitney Realty Company, Limited, the Collingwood Land Company, and Floyd C. Williams for the specific performance of a land contract and to quiet title. From a decree for complainant, defendants Collingwood Land Company and Williams appeal. Affirmed.

McPherson, Dunn & Maun (Allan Campbell, of counsel), for complainant.

Charles Flowers, for defendant Ranney.

Moloney & Mendelsohn, for appellants.

BIRD, J. In the year 1912 Frederick T. Ranney sold to complainant upon contract certain lots lying partly in the city of Detroit and partly in the township of

Greenfield, and described as: Lots 1, 2, 3, 4, 166, 167, and 168 of Ranney's boulevard, subdivision of lots A and B of plat of southerly 46 acres of quarter section 26, 10,000-acre tract, according to the plat thereof. Upon payment being tendered and a conveyance demanded of the lots, it was discovered that the estate of Robert Thuner claimed some interest therein, whereupon this bill was filed to compel a specific performance of the contract, and to remove the cloud from the title. The claimed interest of the Thuner estate appears to have arisen in this way: In 1894 Ranney and Thuner were owners in fee of certain real estate, of which the lots in question were a part. A mortgage was held thereon by David Whitney, Jr. Subsequently the mortgage was discharged by Whitney, and Ranney and Thuner conveyed the fee to him, and he in turn gave them a contract of repurchase. Being in poor health and pressed for funds, Thuner afterward made the following assignment of his interest to Ranney:

"For and in consideration of the sum of one (\$1.00) dollar, I hereby sell, assign and set over unto Frederick T. Ranney all my right, title and interest in and to the above contract.

"Dated, Detroit, Mich., January 14, 1909.

[Signed] "ROBERT THUNER [L. S.]"

On the same day Ranney and Thuner executed a contract, which recited the fact that they had purchased upon contract from David Whitney, Jr., certain lands, and that Thuner had assigned his interest therein to Ranney. It further recited the fact that Thuner was indebted to Ranney in the sum of \$4,788.85, and that they were indebted to the Whitney estate on said contract in about the sum of \$27,000. It then provided that in consideration of the assignment of Thuner's interest to Ranney, Ranney should make haste in platting the property, and that he should

place it upon the market and sell the same for the best price obtainable therefor, and the proceeds therefrom should be disposed of as follows: *First*, the indebtedness to the Whitney estate should be paid; *second*, the expenses of platting the property and placing it upon the market and selling the same should be deducted from the common fund; *third*, that Thuner's indebtedness to Ranney should then be paid wholly out of Thuner's share of the profits; lastly, it was provided that the balance remaining should be divided equally, and Thuner's share paid to him. Later Robert Thuner died, leaving a large number of creditors. The debts were proved against the estate, and application was made by the administrator to sell Thuner's interest in the land, which was the subject of the assignment to Ranney, and the same was sold under order of the probate court and the defendant Williams was the purchaser thereof, who afterward conveyed his interest to the Collingwood Land Company. The complainant claims that the probate sale was of no force because Thuner had no interest in the lands after making the assignment to Ranney. The defendant Collingwood Land Company claims that the conveyance by Ranney and Thuner to Whitney, and the contract to repurchase, construed together, constituted a mortgage, and consequently the title to an undivided half of the property remained all the while in Thuner, and that the assignment of his interest in the contract did not carry title to Ranney.

1. In 1894 Ranney and Thuner were tenants in common of the premises in question. To secure their debt to Whitney they deeded the premises to him and took back a land contract, with a provision that in case of default their rights therein should be foreclosed in chancery. The deed and contract read together undoubtedly constituted a mortgage. This being true, the equitable title remained in Ranney and Thuner.

While the title stood in this way Thuner sells and assigns his interest in the contract to Ranney, and they, at the same time, execute a contract, which provides what disposition shall be made of the consideration. The assignment, considered in connection with the contract, leads to the conclusion that it was intended to pass the equitable title to the land, with the right to control the legal title. The real consideration for the assignment was a full and adequate one. Thuner was to receive his full share of the profits, whatever sum they might yield, and this fact leads to the conclusion that the title was intended to be conveyed. This view is further strengthened by the fact that Thuner recorded the contract as a deed and not as a mortgage, and later when he sold a half interest thereof he described it as a "one-half interest in his share of the profits," etc.

But counsel argue that the assignment carried nothing with it save a half interest in the contract. What interest was that except the right to pay Whitney's debt and have the lien discharged? If Ranney paid the debt and had the lien discharged, he would be the loser, unless he could reimburse himself out of the profits, and he could not do that unless he could sell and convey the lots. We think it is clear that when Thuner executed the assignment, he thereby intended to convert his incumbered title interest into a contract right for a participation of profits. See *Hickman v. Chaney*, 155 Mich. 217 (118 N. W. 993).

2. The further point is made that complainant does not come into court with clean hands because it has violated certain building restrictions on the lots in the vicinity by erecting its armory on lots 166, 167, and 168. The only building restriction which appears in the contract for lots 166, 167, and 168 is that "no building shall be erected thereon nearer than 20 feet from the street line." It does not appear that this

restriction has been violated; neither does it satisfactorily appear that complainant had knowledge of other restrictions which are claimed to have been known and observed by other lot owners in that vicinity before it purchased the lots. The chancellor who heard the cause was of the opinion that the assignment was intended to convey all of Thuner's interest in the lots, and we agree with him.

The decree of the trial court must be affirmed. Complainant will recover its costs in this court against the Collingwood Land Company. No other costs will be allowed.

STONE, C. J., and KUHN, OSTRANDER, MOORE, STEERE, BROOKE, and PERSON, JJ., concurred.

PEOPLE v. LAY.

1. CRIMINAL LAW—PLEA IN ABATEMENT—PLEADING—COURT—BIAS OR INTEREST.

A party who interposes a dilatory plea in a prosecution for a criminal offense invites the most rigid scrutiny of its sufficiency, under the well established rules of pleading; and, therefore, a plea in abatement to an indictment for embezzlement, which pleaded the fact that the circuit judge had been employed as an attorney by some of the creditors of the corporation, of which respondent was one of the vice presidents, and was pecuniarily interested in the result of the prosecution, was not sufficient, where the evidence showed that the relation between the judge and the creditors had terminated before he called the grand jury, since the indictment does not place the respondent in jeopardy, but is preliminary to the hearing:

also, under the statutes of Michigan, the accused is limited to the one ground of objection, viz., that some one summoned to serve is prosecutor or complainant against him.

2. SAME—DISQUALIFICATION OF JUDGE.

And where the circuit judge, who was later called to hear the case, was incapacitated by a similar disqualification, but the presiding judge overruled the motion for a change of venue, calling in another circuit judge to hear the case on the merits, the accused waived any right to object to having the judge act as substitute in arguing the plea without objection before him.

3. SAME—BILL OF PARTICULARS.

Where a bill of particulars was filed in a criminal proceeding covering the embezzlement of \$12,000 of so-called salary, and also covering a further embezzlement of \$25,000 for another year, but the trial proceeded throughout in relation to the year 1913, when he received the larger amount of salary, a request to instruct the jury that no claim was made under the bill of particulars for the \$25,000 salary, and the evidence about the same could only be considered as bearing on his intent in receiving the \$12,000, was correctly refused, for the reason that it was not presented until after the arguments were completed and the case had been tried and argued on a contrary theory.

4. SAME—EVIDENCE—PRIVILEGE—BANKRUPTCY.

While testimony in a criminal prosecution, showing the sworn statements of respondent upon examination in bankruptcy proceedings of the corporation of which he was an officer, should have been excluded because it was privileged, it could not be said to have prejudiced the accused who afterwards went on the stand and gave testimony relative to the same facts.

5. SAME—SALARY—DEFINITION.

A salary is defined as a periodical allowance made as compensation to a person for his official or professional services or for his regular work.

6. SAME—CONSPIRACY—EMBEZZLEMENT—CORPORATIONS—OFFICERS.

Under a charge that respondent and other officers of a corporation had conspired together to wrongfully and secretly convert to their own use funds of the corporation,

in form of excessive salaries, the evidence showing the taking of the money, and that it was authorized by the conspiring officials, and they, with accused, were in control of the corporate funds, presented an issue which the court rightly submitted to the jury.

7. SAME—INSTRUCTIONS TO JURY—FRAUDULENT INTENT.

And upon proofs that respondent received a large and unauthorized salary, which was charged on the books to a fictitious account, the court was right in charging the jury that the object of introducing evidence about the fictitious account was to show that the true account of the money which respondent received was secreted, but the evidence could not be considered unless the jury also found that the money was so charged with the knowledge and consent of respondent, or with the knowledge and consent of others with whom he was knowingly co-operating in committing the offense.

8. SAME—CONSPIRACY—KNOWLEDGE.

Where two or more conspire together to commit an actionable wrong everything said, done, or written by any one of them in the execution or furtherance of the common purpose is deemed to be said, done, or written by everyone, and is a relevant fact as against each.

9. SAME—INSOLVENCY OF CORPORATION—EVIDENCE—INTENT.

But evidence as to insolvency of the corporation stood upon a different footing: though respondent joined in a report of its annual condition to the State, showing serious impairment of the capital, the report was not conclusive, when he denied knowing its contents and claimed he had not read it and did not know of the alleged insolvent condition.

10. SAME—CONSPIRACY—KNOWLEDGE—INSTRUCTIONS.

And where the court charged that if the jury found the corporation was insolvent when his salary was increased, that was not to be considered as indicating bad faith unless he knew of the condition, or unless others with whom he was acting in concert knew of the insolvency, the error was prejudicial and reversible, and it was improper to permit the jury to consider the knowledge of the other conspirators as proof of the motive and intent of the accused.

Exceptions before sentence from Kalamazoo; North, J., presiding. Submitted April 14, 1916. (Docket No. 130.) Decided December 21, 1916.

George T. Lay was convicted of embezzlement. Reversed.

Grant Fellows, Attorney General, and *Frank F. Ford*, Prosecuting Attorney (*Charles W. Nichols*, of counsel), for the people.

Claude S. Carney and *William W. Potter*, for respondent.

PERSON, J. Respondent was indicted jointly with his brother, Frank B. Lay, Jr., and one Victor L. Palmer, for the alleged embezzlement of a considerable sum of money from the Michigan Buggy Company, a corporation doing business in the city of Kalamazoo. The indictment was returned by a grand jury sitting in and for the county of Kalamazoo, on the 15th day of January, 1914. Separate trials were claimed by the several defendants named therein, and in April, 1915, respondent was convicted of the offense charged. He brings the case here upon exceptions before sentence.

Previous to the trial of respondent, his brother, Frank B. Lay, Jr., had been tried and convicted upon the indictment, and his case has been before this court, and was disposed of by an opinion which will be found *ante*, 17 (159 N. W. 299). That opinion contains a very full statement of the facts, which are substantially the same in the two cases. In this opinion such only will be given as are necessary to an understanding of the points decided.

Respondent insists that the money which he is charged with embezzling was received by himself and others in good faith as salaries. The prosecution, on

the other hand, charge that it was fraudulently taken from the company without any regard to just compensation for services, and that it was termed "salaries" simply as a cover for the defalcation.

Respondent entered the service of the company in September, 1911, at a salary of \$300 per month. Its officers at that time were M. Henry Lane, president, Victor L. Palmer, secretary, and respondent's father, Frank B. Lay, Sr., treasurer. These three owned all of the common stock of the company, and constituted its board of directors. A considerable amount of preferred stock was outstanding, but it had no part in the control of the company. The larger portion of the common stock was held by the senior Lay and Lane in about equal proportions; the amount held by Palmer being less than that held by either of the others. Frank B. Lay, Jr., had been employed by the company for some time and at a salary not exceeding that paid respondent.

Just prior to the annual meeting of the company's stockholders in April, 1912, respondent and his brother had each been given a small amount of stock so that they might participate in the meeting. At the meeting respondent and his brother were made directors of the company, thus enlarging the board to five members. At the meeting of the directors, which soon followed, the senior Lay was made president of the company in the place of Lane who had held the office for many years, Palmer was elected its secretary and treasurer, and respondent and his brother were each made vice presidents. Mr. Lane was given the office of "chairman of the board." Before the annual meeting of the stockholders the salaries of the then existing officers had been fixed for the year by the directors. Mr. Lane, as president, was to receive \$6,000, Mr. Lay, as treasurer, \$6,000, and Mr. Palmer, \$6,000, with an additional \$6,000 at the discretion of the di-

rectors. It does not appear that any larger salaries had ever been paid during the many years of the company's existence. Shortly after the annual meeting, respondent, with his father, brother, and Palmer, held a conference at the Burdick House, in the city, and agreed that they would thereafter draw salaries as follows: The elder Lay \$35,000 per year, including his dividends, Palmer \$25,000 per year, and the two Lay brothers each \$12,000. It seems that the dividends which Mr. Lay had been receiving prior to that time had amounted to about \$11,000 annually. This conference was unknown to Mr. Lane, and he was not present. Nor was he aware of the alleged increase in salaries until after the company's failure. His own had not been changed. Neither is it shown that the preferred stockholders were ever told of the amounts being received as salaries by the parties to the conference. After that the salaries of respondent and his brother were again enlarged. From the 2d day of January, 1913, and until July of that year, by an agreement between themselves and Palmer, each drew at the rate of \$25,000 a year. In August the company went into bankruptcy.

Prior to the agreement for the alleged increase in salaries respondent had been paid his \$300 per month in two checks of \$150 each. The others had received their salaries also by checks. For the purpose of proving the fraudulent intent with which the alleged increase in salaries was made by the parties to the agreement, it was shown that they continued to receive checks for the same amount as theretofore, but that the increase itself was paid to them by Palmer in cash, and that the cash so paid, instead of being entered in the salaries account on the books of the company, was charged partly to advertising, but mostly to a fictitious account in the name of "J. Roach & Co.,"

which appeared as an account receivable. This proof was objected to by counsel for respondent upon the ground that respondent was not shown to have had any actual knowledge either of the fictitious account or of the manner in which Palmer was concealing the payment of the increased salaries. It was also shown by the prosecution, as a motive for taking these alleged increased salaries, that the company was insolvent at the time, and its capital stock impaired to the extent of several hundred thousand dollars. This was shown in part by producing the company's annual report for the year 1912, in which the impairment of the capital stock plainly appeared. Although this report was signed by respondent, with his father, brother, and Palmer (but not by Lane), yet respondent denied all knowledge of its contents and all knowledge of the company's insolvency. For this reason the admission of the report and of other proofs of insolvency was objected to by respondent's counsel.

In August, 1913, as above stated, the Michigan Buggy Company was declared bankrupt. At nearly the same time the Honorable Nathaniel H. Stewart, who had long been a practicing lawyer in the city of Kalamazoo, was appointed circuit judge of the ninth judicial circuit, which includes the county of Kalamazoo. His appointment was made to fill a vacancy caused by the death of the regularly elected incumbent. Judge Stewart continued in office until the general fall election in 1914, when he was succeeded by Judge Weimer. During the period of Judge Stewart's incumbency, and at the November term of court in the year 1913, he ordered the summoning and impaneling of the grand jury that returned the indictment under consideration.

The errors assigned on this appeal fall into two general groups. The first relates to the summoning of the grand jury, the qualifications of its members,

and to matters preliminary to the trial of the case upon its merits. The other consists of errors alleged to have occurred at the trial in the admission of evidence, and as to instructions given or refused.

In this case, as in the one against Frank B. Lay, Jr., several pleas in abatement were interposed to the indictment. The first plea alleges that Judge Stewart, before he ordered the grand jury convened, and presumably before his appointment, had been employed as attorney by certain creditors of the Michigan Buggy Company to procure the allowance of their claims against that company. The second alleges that when he ordered the convening of the grand jury he was a stockholder in various corporations to which the Michigan Buggy Company was debtor. Because of these facts it is averred that he was disqualified to order a grand jury, and that all of its acts were therefore void, including the return of the indictment against respondent.

The third and fifth pleas relate to the competency of certain of the grand jurors. By the third it is charged that several of them were stockholders in banks which were creditors of the Michigan Buggy Company and held its commercial paper guaranteed by respondent. One of the grand jurors is said to have been a director in such a bank. The fifth plea charged that the circuit judge, who had, himself, been employed by creditors of the Michigan Buggy Company, and who was a stockholder in various corporations to which the company was indebted, caused the official stenographer of the court to be placed upon the grand jury as a talesman, and that the stenographer had done various things, recited in the plea, tending to show, it is alleged, his prejudice against respondent and an interest in his prosecution.

The fourth plea charged that the circuit judge set aside the lists of jurors that had been returned from

the several townships for the current year, and unlawfully caused the grand jury to be drawn from new lists which were returned by his order. This action of the circuit judge is charged to have been unwarranted, inasmuch as the original lists had never been declared illegal. And it is averred that because of this action of the circuit judge the grand jury was not a lawful body, and was not authorized to find the indictment against respondent.

The pleas contain many inferences of the pleader not warranted by the facts stated. As was said in *People v. Lauder*, 82 Mich. 109 (46 N. W. 956), under similar circumstances:

“A party interposing such dilatory plea invites the most rigid scrutiny of its sufficiency under the established rules of pleading.”

Considered in the light of this rule, the pleas do not show that either Judge Stewart or any of the grand jurors had a pecuniary interest in the indictment or conviction of respondent. So far as concerns any facts stated, the judge's employment by the creditors of the Michigan Buggy Company terminated before he called the grand jury. It is urged that he and the grand jurors referred to in the third plea were interested as stockholders in the creditor corporation, because such testimony as would convict respondent would also establish the claims of the several corporations in civil proceedings against him. It was not averred that any civil proceedings were pending or contemplated. And it is not shown how such civil proceedings would be advanced or benefited by respondent's indictment and conviction. In *State v. Rickey*, 10 N. J. Law, 83, a plea to an indictment was held bad which averred that one of the grand jurors was a stockholder in the bank whose funds the respondent was charged with embezzling.

Certainly Judge Stewart would not have been disqualified to call a grand jury even if he had been interested in respondent's indictment. A grand jury is convened for the general purpose of investigating all such charges of crime as may be brought to its consideration. And it cannot be claimed that a judge's interest in the prosecution of some particular offender would disqualify him from ordering a grand jury for the purpose of inquiring into offenses generally.

But there is a more complete answer, and it applies to all of the pleas in abatement. The action of a grand jury does not place the accused in jeopardy, in any legal sense, and is merely preliminary to a trial upon the facts. It is not in the interest of justice that its proceedings should be treated in any captious or technical manner. The statutes of this State have therefore limited the accused to a single ground of challenge, namely, that some one summoned to serve upon the grand jury is a prosecutor or complainant against him. This applies as well to the array as to any single juror. 3 Comp. Laws, §§ 11881, 11882 (5 How. Stat. [2d Ed.] §§ 15052, 15053, 3 Comp. Laws 1915, §§ 15708, 15709). The effect of this statute has been considered in a variety of cases. *People v. Lauder, supra*; *People v. Smith*, 118 Mich. 73 (76 N. W. 124); *People v. Reigel*, 120 Mich. 79 (78 N. W. 1017); *People v. Thompson*, 122 Mich. 411 (81 N. W. 344); *People v. Morgan*, 133 Mich. 550 (95 N. W. 542); *People v. Salsbury*, 134 Mich. 537 (96 N. W. 936); *People v. Lay, supra*. The last case fully explains what is intended by the statute when it refers to "prosecutor" and to "complainant"; and in the light of that explanation it cannot be said that any grand juror in this case was either the one or the other. The pleas therefore should have been, as they were, overruled.

Although, as has been shown, the pleas should have been overruled for lack of merit, yet it is insisted that

Judge Weimer was incapacitated from passing upon them, and that his order by which they were overruled was wholly void and of no effect. This contention is based upon the charge that Judge Weimer, as well as Judge Stewart, had been attorney for various creditors of the Michigan Buggy Company in proceedings to collect their demands. After he had disposed of the pleas respondent filed a petition asking for a change of venue and that some other judge be called in to hear interlocutory proceedings. It was alleged in the petition that Judge Weimer had been attorney for various creditors, as hereinbefore stated, and that in one of those proceedings the insolvency of the company was a material issue, as it was in this case. Upon the filing of the petition the judge denied the application for a change of venue, but called in Judge North from another circuit to preside at the trial of the case upon its merits. Respondent had argued the pleas before Judge Weimer without objection, and went to trial before Judge North without suggesting the invalidity of the order by which they were overruled. Now, founded upon that same petition, and after he has been convicted upon the merits of the case, respondent makes the claim that the verdict and conviction should be set aside so that he may have another adjudication upon the merits of his pleas. We do not consider it necessary to pass upon Judge Weimer's alleged disqualification to act in this case. Respondent had the right to file the dilatory pleas, or not to file them, as he chose. And he had the same right to waive a hearing upon them that he had to refrain from filing them in the first place. We are not passing upon his power to waive the disqualifications of the judge, but to waive a hearing upon the pleas. When he went to trial before Judge North he knew every alleged disqualification of Judge Weimer, as well as he does now. The petition upon which he founds

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his present contention had been filed long before. If he thought that the order made by Judge Weimer overruling the pleas was void, he could have insisted that they be passed upon by some competent judge before engaging in the trial upon the merits. Not having done so, he must be held to have waived all right to insist upon them now.

In passing upon the errors alleged to have occurred upon the trial of the case, we will first consider the one relating to the bill of particulars. There were two indictments for embezzlement, it seems, returned against respondent jointly with his brother and Palmer. He was tried under the one which alleged embezzlement of the company's money during the period when he was receiving the alleged salary at the rate of \$25,000 per year. It is stated in the brief of counsel for the people, and is not disputed by respondent, that the other indictment covered the period in the year 1912, when he was receiving the alleged salary at the rate of \$12,000 per year. After the testimony upon the trial had been received and the arguments closed, counsel for respondent called the attention of the court to a bill of particulars covering the period in 1912, and requested that the jury be instructed as follows:

"A bill of particulars has been filed in this case. No claim is made in that bill of particulars of the embezzlement of the \$25,000 salary. The people's claim is limited to the salary of \$12,000. The fact that respondent received the increase from \$12,000 to \$25,000 can be considered by you only as bearing upon the intent with which he received the \$12,000."

The court refused this request and noted thereon in writing the following reason:

"This request is refused, because it was not presented until after the arguments were completed. The case was tried throughout and argued to the jury by defendant's counsel on a contrary theory, and the at-

torneys representing the people claim a proper bill of particulars was served on defendant's counsel."

After a careful examination of the record we are satisfied that the court was right. The trial throughout was for embezzlement alleged to have taken place in the year 1913, and if the bill of particulars was intended to apply to this case respondent waived all right to rely upon it.

Previous to his indictment respondent had given testimony before the referee in bankruptcy upon an examination into the affairs of the Michigan Buggy Company. Against his objection that testimony was read to the jury in this case. This is assigned as error. The same question arose in *People v. Lay, supra*, and it was there held that such testimony was incompetent because of the immunity granted by the Federal statute. We see no reason for modifying the conclusion there reached, and the testimony should have been excluded. But in this case it is apparent that respondent could not have been prejudiced by its admission, inasmuch as he himself afterwards went upon the witness stand and substantially reiterated all that he had said before the referee. We have examined the testimony given by him in each instance, and are satisfied that he did this voluntarily, and not for the purpose of modifying or explaining anything that he had previously said. A party cannot complain that facts have been improperly proven when he himself voluntarily admits their truthfulness.

We now come to the most important question raised by this appeal. A "salary" is defined in Standard Dictionary as:

"A periodical allowance made as compensation to a person for his official or professional services or for his regular work."

That we believe to be the accepted meaning of the term. Undoubtedly an officer of a corporation may

receive an exorbitant salary without incurring criminal responsibility therefor, if it is authorized by competent authority, or received in good faith as compensation for services.

But in this case it is charged that respondent conspired with other directors and officers of the company, who had control of its property, to wrongfully and secretly convert its funds to their own personal uses; that in so doing they were not governed by the idea of compensation, and that they called the moneys so taken "salaries" only as a cover for their defalcations. If the charge is true, their conduct comes fairly within the terms of the statute under which they were indicted. That statute, so far as its provisions are here important, reads as follows:

"If any officer * * * of any * * * incorporated company * * * shall embezzle or fraudulently dispose of or convert to his own use * * * without consent of his employer or master, any money or other property of another, which shall have come to his possession, or shall be under his charge by virtue of such office or employment, he shall be deemed by so doing, to have committed the crime of larceny." 5 How. Stat. (2d Ed.), § 14614; 3 Comp. Laws, § 11565, as amended by Act No. 102, Pub. Acts 1905, 3 Comp. Laws 1915, § 15310.

The taking of the money is conceded. There is no claim that it was authorized except by the alleged conspirators themselves. And if they intended to wrongfully convert the company's money to their own uses, they had no authority, as directors or otherwise, to express the company's consent thereto. Nor have we any doubt that the money converted was in their possession, and in the possession of each of them, within the meaning of the statute. They were directors of the company charged with the control of its property, and the checks of each, when drawn upon its

funds, were honored without question. *People v. Butts*, 128 Mich. 208 (87 N. W. 224).

It is also admitted that the money was taken by an agreement between the parties named in the indictment; and whether this agreement amounted to a conspiracy to take the money wrongfully and illegally depends upon the purpose and intention of the parties. As proof of this intent the prosecution introduced evidence tending to show that what are called increased salaries were never entered as such upon the books of the company; that Palmer drew the money with which they were paid from the local banks on checks drawn to "cash," and that the money so drawn and used by him was charged to a fictitious account which appeared upon the books as an account receivable. It was also shown that when the money covered by this indictment was taken the company was insolvent in the sense that its capital stock had been impaired to the extent of several hundred thousand dollars. There was no direct evidence showing respondent's knowledge of the method used in obtaining the money, or of the way in which it was entered upon the books, and the proof offered of these matters was duly objected to by his counsel. It was shown that respondent signed the company's report for the year 1912, by which the impairment of its capital was admitted; but he denied any knowledge of the contents of the report, and any knowledge of the company's insolvency. In relation to these matters, and to their admissibility as bearing upon respondent's intent, the court instructed the jury as follows:

"Evidence has been introduced tending to show that the account of the money paid to the defendant was kept in two separate and distinct accounts, namely, the pay roll account and the account of J. Roach & Co. The only object for introducing the account of J. Roach & Co. is to show that the true account of the money

paid the defendant was secreted, but you cannot consider that element in the case unless you shall find that that money was kept in the J. Roach & Co. account with the knowledge and consent of the defendant, or with the knowledge and consent of others with whom the defendant was knowingly co-operating in committing the offense with which he is charged. And so too of the matter of the insolvency of the company, if you find that to have been the condition at the time that arrangement was made for this increase in salary, that is not a circumstance which should be considered by you as indicating bad faith on the part of this defendant in accepting an increase in salary unless he knew of that unfortunate condition of the company at the time, or unless others with whom he was acting in concert to do this offense with which he is charged knew of the failing condition of the company."

Respondent assigns error upon these instructions, as well as upon the admission of the evidence referred to, and insists that neither the method of raising the money and entering it upon the books nor the insolvency of the company were competent proof of his bad intent, because never shown to have been actually within his knowledge.

It is true that the proofs do not bring home to respondent any actual knowledge of the "J. Roach & Co." account, or that the increased salaries were charged to that account. And, if there had been no other proof of his bad faith, it is undoubtedly true that Palmer's concealment of the salaries by means of that account could not have been used to show it. But there was other evidence of respondent's bad faith, and enough to justify the court in receiving this evidence upon the theory that a conspiracy had been shown to embezzle the company's money.

"Wherever two or more conspire together to commit an actionable wrong, everything said, done, or written by any one of them in the execution or furtherance of their common purpose is deemed to be so said, done, or written by every one and is a relevant fact as against each." *Hamilton v. Smith*, 39 Mich. 222.

And see *People v. Pitcher*, 15 Mich. 397; *People v. Saunders*, 25 Mich. 119; *People v. Arnold*, 46 Mich. 268 (9 N. W. 406); *People v. Salsbury*, 134 Mich. 537 (96 N. W. 936); *People v. McGarry*, 136 Mich. 316 (99 N. W. 147). The evidence of Palmer's method of raising the money with which to pay the alleged increase in salaries, and of the manner in which it was charged upon the books of the company, was properly received.

But the evidence as to the insolvency of the company is of a different character. It is true that respondent signed the annual report by which the impairment of its capital was shown, and the report was therefore admissible, but it was not conclusive as to his knowledge of the company's condition. He says he never read the report, and did not know what it contained, and did not know of the company's insolvency. This raised a question of fact for the jury. If they believed that he did know of its precarious condition, they had the right to take that knowledge into consideration in determining his purpose and intent in agreeing to the alleged increase for the others and in receiving the alleged increase to his own salary. But he could not be charged with the knowledge of the others. The court made the mistake of confounding what the others did in carrying out the conspiracy, if there was one, with what they knew when they went into it.

One conspirator is chargeable with the acts of the others upon the principle that governs in case of agency, but that does not make him responsible for the antecedent knowledge of the others. It was not vital to the case that respondent's knowledge of the company's insolvency should have been established. The property of a solvent corporation may be embezzled, as well as the property of an insolvent one. But knowledge that the company was in a failing condition

may have been considered by the jury as strong proof of respondent's motive and intent, and we cannot know what their conclusion would have been if they had found such knowledge not possessed by nor imputable to him.

For this reason, the conviction is set aside, and a new trial ordered.

STONE, C. J., and KUHN, OSTRANDER, BIRD, MOORE, STEERE, and BROOKE, JJ., concurred.

HOROWITZ v. BLAY.

1. NEGLIGENCE—EXCAVATING SOIL—DUTY TO OWNER—SUPPORT.

The owner of a parcel of ground who desired to erect a building on his land with a basement of ordinary depth and character was entitled to excavate the entire width of the lot unless some duty to the adjoining owner or the tenant of the building was violated: the mere fact that the excavation caused one of the walls of the building to fall does not in itself establish liability.¹

2. SAME—ADJOINING LANDOWNERS—EXCAVATION.

Where one of the witnesses for plaintiff testified that the wall should have been underpinned as a protection against the consequences of excavating the adjoining lot, and where plaintiff assumed that the duty of constructing the underpinning rested upon those who made the excavation, but there was no proof that the ground under the wall would have given way except for the weight of the building, the obligation was not on the excavators but rested with the proprietor of the building.

¹On the question of liability for injury to buildings on adjoining land by negligent removal of lateral support of the soil, see note in 6 L. R. A. (N. S.) 243.

3. SAME—EVIDENCE—BURDEN.

Moreover, mere evidence that those excavating permitted water from the mains to accumulate did not show negligence without proofs tending to connect the fall of the building with the water, or that the ground was softened thereby so as to weaken the support.

4. SAME—APPEAL AND ERROR—OFFER OF PROOF.

Where counsel stated that he had witnesses in court whom he offered to produce to give testimony that the men in charge of excavating the ground were incompetent, inefficient, and negligent, his statement amounted to a conclusion only, and unless the court could determine that the testimony, if received, might or would have changed the result, it will not reverse the judgment, upon writ of error.

Error to Wayne; Hosmer, J. Submitted April 5, 1916. (Docket No. 16.) Decided December 21, 1916. Rehearing denied April 19, 1917.

Case by Minnie Horowitz against Euphemia Blay, Isaac L. Polozker, Desire B. De Coster, and Norval Wardrop for injuries to a stock of merchandise. Judgment for defendants on a directed verdict. Plaintiff brings error. Affirmed.

Donnelly, Lyster, Brennan & Munro, for appellant.

Louis C. Wagner, for appellee Polozker.

Charles H. Hatch, for appellees De Coster and Wardrop.

This is an action brought to recover damages for injuries to a stock of shoes caused by the falling of the wall of the building in which they were stored. This building was a two-story brick standing on the south side of Gratiot avenue, in the city of Detroit. Plaintiff was in possession as tenant of a Mrs. Blay, and occupied the first story as a shoe store and the second story as a residence for herself and her family. The building extended back from the street about 60 feet, and the easterly wall, which fell, came to the

easterly line of Mrs. Blay's lot. There was no basement to the building, and its foundation walls extended only about 3 feet below the surface of the ground. Dr. Polozker owned the lot adjoining Mrs. Blay's on the east, and at the time of the accident his lot was being excavated for the purpose of erecting a building upon it. The excavation had been going on for some time before the occurrence of the accident, which took place on the 29th day of April, 1912. That was on a Monday, and the first appearance of any cracking in the easterly wall of the building occupied by plaintiff was on the afternoon of the preceding Friday. During the forenoon of the next day, Saturday, Mr. De Coster, Dr. Polozker's contractor, caused the northerly end of the wall to be shored up for a distance of about 12 feet from the street line. At that time the ground had been removed from the entire front end of Dr. Polozker's lot to a depth of 7 or 8 feet and for a distance of some 20 feet back from its northerly line. From that point the excavation gradually sloped to the surface of the ground. Upon the shoring up of its northerly end the cracking of the wall ceased, and was not renewed until about 8 o'clock on Sunday evening. During that period all of the parties seemed to have considered the building fairly safe. A fall of rain began on Sunday afternoon, and continued for about 20 hours. On the morning of Monday, the 29th, the cracks in the front part of the wall were found to be considerably wider than they had been on Saturday, and other cracks had appeared further to the south above that part of the foundation next to which some ground had been excavated on that day. During the afternoon of Monday a large body of bricks fell from the wall above the surface line of the ground and next to the excavation last mentioned. Shortly after that most of the wall that had not been shored up came down. In falling it inflicted considerable injury

upon plaintiff's stock of shoes on the first floor of the building, and she brings this action against Dr. Polozker, as owner of the lot which was being excavated, against Mr. Wardrop, his architect, and against Mr. De Coster, who had the contract for the erection of the building for Dr. Polozker, attributing the injury to their negligence in making the excavation. Mrs. Blay, the owner of the building occupied by plaintiff, was originally joined as defendant, but at the beginning of the trial the cause was discontinued as against her. At the close of plaintiff's proofs it was the opinion of the trial court that she had failed to maintain the charge of negligence, but that, if negligence had been shown, it was the negligence of one Raymond, an independent contractor, to whom De Coster had sublet that portion of the work, and therefore not imputable to defendants. For these reasons a verdict was directed against the plaintiff, and she brings the case to this court by writ of error.

PERSON, J. (*after stating the facts*). Unless it has been shown that the injury to the building occupied by plaintiff is chargeable to some fault on the part of the excavators, it is, of course, unnecessary to determine whether Raymond, who had charge of the work, was an independent contractor or not.

It appears from the record that Dr. Polozker desired to erect a building upon his lot with a basement of the ordinary depth and character. It was a legitimate object. And in the accomplishment of his purpose he or his employees had the undoubted right to excavate the entire width of his lot, without incurring liability for injury to the adjoining building, unless, in the prosecution of the work, some duty to the owner or occupant of the building was violated. The mere fact that the excavation caused the wall of the building to fall does not establish such liability. *Ward v. Andrews*, 3 Mo. App. 275.

It is clearly shown by the testimony of plaintiff's witness Decker that the wall which fell should have been underpinned as a protection against the consequences of the excavation. And it is claimed by plaintiff that the duty of constructing such underpinning rested upon those making the excavation. In this she is mistaken. There is no evidence that the ground under the wall would have given way except for the weight of the building resting upon it. It was a clay soil, and held its place on all other sides of the excavation. By placing the wall of her building upon the line with a three-foot foundation under it the adjacent owner could not impose upon Dr. Polozker, or his employees, the burden of supporting it by an underpinning before making use of his own lot. *Gildersleeve v. Hammond*, 109 Mich. 431 (67 N. W. 519, 33 L. R. A. 46); *Hemsworth v. Cushing*, 115 Mich. 92 (72 N. W. 1108); *Bissell v. Ford*, 176 Mich. 64 (141 N. W. 860). Plaintiff, as occupant of the building, saw the work of excavating proceed day by day without taking any steps to protect her goods from possible injury. And it is to be assumed that the owner of the fee also knew that the excavation was in progress; for, if she did not, and those responsible for the excavation were guilty of any negligence in failing to notify her, the burden of proving such negligence rested on the plaintiff just the same as the burden of proving any other negligence.

It was also shown that the excavators permitted water from the mains in the street to run into and accumulate in the excavation. If there had been evidence to connect such accumulation of water with the falling of the wall, it might have amounted to proof of negligence; for, although the excavators were not required to furnish the labor and sustain the expense of constructing supports for the wall, yet they were

bound to conduct the work of excavation with such ordinary care and skill as to avoid unnecessary injury to the building. *Bissell v. Ford, supra*; *Larson v. Railway Co.*, 110 Mo. 234 (19 S. W. 416, 16 L. R. A. 330, 33 Am. St. Rep. 439). But the evidence does not show the depth of the water next to the ground under the wall, nor that any of the ground in that vicinity was softened or gave way, before the wall fell. In fact, the part of the wall that first came down was to the south of the deeper part of the excavation.

These are the only specific acts of alleged negligence shown by the testimony. At the close of his proofs counsel for plaintiff did say:

"We have witnesses here in court, and we now offer to produce them and produce testimony to the effect that the men actually in charge of the excavation on the premises were incompetent, inefficient, and negligent, and were a large part of the time decidedly under the influence of alcohol."

This offer was not sufficiently definite as to acts of negligence to make its rejection erroneous. It did not give the court any information as to the facts plaintiff could prove bearing upon negligence, but simply stated counsel's opinion as to their legal effect. If the proofs had been received, it might have transpired that counsel was mistaken, and that they had no tendency to show negligence, or that the negligence shown had no relation to the injury. This court cannot justly reverse a case because of the exclusion of testimony unless it is able to see that the testimony, if it had been received, might have changed the result.

Plaintiff having failed to show any negligence on the part of those making the excavation that contributed to her injury, the other questions raised become immaterial, and the judgment will be affirmed.

STONE, C. J., and KUHN, OSTRANDER, BIRD, MOORE, STEERE, and BROOKE, JJ., concurred.

ATTORNEY GENERAL *v.* CONNOLLY.

1. CONSTITUTIONAL LAW—TEACHERS' PENSION—STATUTES — CLASS LEGISLATION—SCHOOLS—CONTRACTS.

The provisions of Act No. 174, Pub. Acts 1915, 2 Comp. Laws 1915, §§ 5767-5780, providing for the establishment of a teachers' pension fund, and providing for contributions from the compensation of those who are actively engaged in their employment to maintain it, are not class legislation, and are not in violation of the Constitution, because the classification of teachers as one employment is reasonable and justifiable; whether such contract will encourage or promote education is a matter for the legislature to determine; any legislation that affects the qualifications, period of service, or reward of teachers acts upon this class.

2. SAME—DUE PROCESS OF LAW—STATUTES.

While the statute affects contributions from teachers, the salaries to be paid constitute a net amount, and the act takes nothing from any one, hence, does not trespass upon the due process prohibition of the Constitutions.

3. SAME—INEQUALITY—TAXATION.

The objection that it is a fund that belongs under the Constitution to the school districts and cannot be taken by the State for a pension fund is untenable as a ground of the invalidity; and whether or not the act effects inequality in contributions by different districts, it is not a reason for holding the law void, as the rule which requires uniformity in taxation does not apply to such districts.

4. SAME—PRIVATE PURPOSE.

The general effect and purpose of the act is not to authorize the expenditure of public money for a private purpose, nor does it award extra compensation to a public agent as forbidden by section 3, Art. 16, of the Constitution. OSTRANDER, J., dissenting.

5. SAME—SCHOOLS—TEACHERS' PENSION—GENERAL ACT — SPECIAL LEGISLATION.

Act No. 174, Pub. Acts 1915, 2 Comp. Laws 1915, § 5767 *et seq.*, creating pensions for teachers, does not violate the section of the Constitution prohibiting extra compen-

sation to public officials and servants, the statute extending similar inducements to teachers already employed and to those who enter public service subject to the pension provisions. Nor does section 14 violate the Constitution, Art. 5, § 30, in that the act does not apply to Detroit until the local retirement fund is discontinued: the general purpose and phraseology of the legislation brings it within the legislative authority. OSTRANDER, J., dissenting.

Quo warranto proceedings by Grant Fellows, Attorney General, against William F. Connolly and others to determine the constitutionality of Act No. 174, Pub. Acts 1915. Respondents demurred to the information. Submitted April 14, 1916. (Docket No. 138.) Writ dismissed December 21, 1916.

Grant Fellows, Attorney General, and *L. W. Carr*, Assistant Attorney General, for petitioner.

William L. Carpenter and *H. E. Spalding*, for respondents.

OSTRANDER, J. (*dissenting*). Pursuant to provisions found in Act No. 174, Pub. Acts 1915 (2 Comp. Laws 1915, §§ 5767-5780), entitled "An act to provide for a retirement fund for teachers in certain cases," which became effective in August, 1915, the governor appointed respondents members of the teachers' retirement fund board, they with the superintendent of public instruction composing the said board.

The act, by its terms, affects all teachers in the public schools of the State except those who, being under contract when the act takes effect, do not elect to come under its provisions. After the act becomes effective, every teacher contracting to teach in a public school is conclusively presumed, by the act of contracting to teach, to agree to pay and to authorize the deduction from salary necessary to pay "the assessments herein provided." The "assessment" varies.

A teacher who has taught 5 years or less in this State, or elsewhere in a public school, contributes one-half of 1 per cent. of the annual contractual salary, but not more than \$5, an amount which the retirement fund board may increase to 1 per cent. of salary, but not more than \$10 in any year. One who has taught more than 5 years, but less than 15 years, contributes 1 per cent. of contractual salary, not more than \$10, and the said board may increase the contribution to 2 per cent., but not more than \$20 in a year. One who has taught 15 years or more contributes 2 per cent., but not more than \$20 a year, subject to an increase by the said board to 3 per cent., but not more than \$30 in a year. The contributions thus provided for, the income from donations, legacies, and bequests, and the income from the fund, constitute the Michigan State teachers' retirement fund for public school-teachers. The custodian of the fund is the State treasurer, and the board is given power to draw warrants upon him for payment of annuities and for purposes of investment of the fund.

No teacher is entitled to an annuity who has not contributed to the fund an amount equal to his annuity for 1 year, but a teacher, otherwise entitled to retire and to an annuity, may pay into the fund in cash an amount which, with previous contributions, equals an annuity for 1 year, or, if unable to do so, may have the required sum deducted from the annuity, withheld, subject to which restriction retirement and participation may occur by request of a teacher, or upon request of a board of education or other governing body of a school district, which request being approved, various annuities are to be paid, the amount depending, generally, upon the years of service as teacher. A teacher who has taught for a period or periods aggregating 30 years, of which at least 15 years, including the last 5 years of service preceding

the application for retirement, shall have been spent in the public schools of the State, may retire after December 1, 1915, and receive an annuity equal to one-half of the annual contractual salary paid to him during the last 5 years, but not more than \$500 nor less than \$300. Teachers who have taught 25 years, 15 years and the last 5 years preceding retirement having been spent in the public schools of the State, may retire after December 1, 1915, and be entitled to an annuity "which bears the same ratio to the annuity provided for on retirement after thirty years of service as the total number of years of service of said persons bears to thirty years." And one who has taught 15 years or more in the public schools of the State, being in the judgment of the board physically or mentally incapable of teaching and deemed deserving of an annuity, may be retired and be entitled to an annuity "of as many thirtieths of the full annuity herein provided after thirty years' service as said teacher has taught years in the public schools of this State." "The board shall pass upon all requests for retirement and shall determine whether such requests should be granted."

If a teacher "ceases to teach in the public schools of this State" before receiving an annuity, he or she is entitled, upon application, "to the return of one-half of the amount, without interest, which shall have been paid into the fund by such teacher," the sum so withdrawn, with interest, to be returned to the fund if teaching is resumed. So if one to whom an annuity is paid resumes teaching, the annuity ceases, to be paid upon a subsequent retirement. Unless it is held to come under the provision for repayment to one who ceases to teach and is not an annuitant, the contingency of death of a teacher is not provided for. The words "shall contribute" are used with respect to the action or duty of teachers. "Conclusively agree to

pay or to authorize the deduction from salary of the assessments herein provided" is another form of words used. Boards of education, trustees, and other school officers are required to "cause to be deducted from each installment of salary of such teachers the *pro rata* amount due from such teachers. * * *."

The act is not applicable to any school district in which, in accordance with any special or local act, public school-teachers are required or authorized to contribute to a teachers' retirement fund, or in which teachers are entitled to annuities or pensions. In such school districts, however, upon the request of two-thirds of contributing teachers, and by a majority vote of qualified electors of the district, the local arrangement may be discontinued and the act becomes operative in such district, the local retirement fund being merged in the State fund. The school district of the city of Detroit is the only one affected by the provisions of this section.

The term "teacher" is defined in the act, and includes all persons teachers in schools in the country and in cities and villages, superintendents and assistant superintendents, supervisors of instruction, principals and assistant principals and special teachers, county school commissioners, county normal teachers, the superintendent of public instruction and his deputies. It includes, as well, all persons employed in teaching or in educational work in the Industrial Home for Girls, Industrial Home for Boys, Michigan Employment Institution for the Blind, School for the Blind, School for the Deaf, State Public School, and State Normal Colleges and Normal Schools.

The attorney general, in an information filed in this court, inquires into the right of respondents to hold and enjoy offices as members of said board, contending that the act is invalid because:

"The measure is class legislation in the obnoxious

sense, deprives certain persons thereby affected of their property without due process of law, and likewise deprives them of the equal protection of the laws.

"The measure attempts to authorize the payment of extra compensation after the service has been performed, in contravention of section 3 of article 16 of the State Constitution.

"The act is unconstitutional because it seeks to authorize the expenditure of public money for a private purpose.

"Section 14 of the act is invalid, and renders the entire measure unconstitutional."

Respondents moved to dismiss the information upon the ground that the objections made to the validity of the act are, and each of them is, insufficient in law. There was a rejoinder and prayer for judgment of ouster. For respondents, and for the validity of the act, it is contended that the law in its operation takes no property of the teacher, and takes no contribution at all except by the consent of the teacher; that there is no natural right to teach and the employment of a teacher is, in its nature, public and may be subject to conditions. Assuming, it is said, that the deduction is a real deduction from salary, and not an appropriation of public money measured by a percentage of salaries, there would then be no deprivation of property without due process of law.

The objection that the act provides for giving extra compensation for services performed is, it is said, inconsistent with the first objection made, since it assumes that the pension or extra compensation is provided out of public, and not private, funds, and that in any event it is unsound, because no one may have advantage of the law who is not in service when the law takes effect and thereafter, and but few could, by election, have advantage of the act before the contract of service, existing when the law becomes, or became, operative, expired; that the act does not provide for expenditures of public money for private purposes,

since a public interest which the legislature may recognize is served and promoted.

Lastly, it is argued that if section 14 is invalid, it is not so vital a part of the act as to make it wholly invalid; but said section is not invalid.

To the argument of the attorney general, to the effect that if the contribution be public money, it belongs to the school districts and cannot be taken by the State for a State pension fund, and that to do so would compel an unequal contribution by different districts, it is answered that the rule requiring uniformity of taxation does not apply, and, if it did, a large proportion of the money available to each school district comes from State taxation and the primary school fund. This fund must undoubtedly be used for school purposes, and there is no other constitutional restriction upon its employment. What the State might retain, it may require the districts to use for the same purposes.

In successive Constitutions of the State the legislature has been enjoined to establish and foster a system of primary schools. In the Constitution of 1909, art. 11, § 1, it is declared:

“Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.”

The educational policy of the State from the year 1817 down to 1874 is, in a measure, reviewed in *Stuart v. School District*, 30 Mich. 69. With the restrictions that a system shall be established whereby a school shall be kept without charge for tuition at least three months in each year in every school district in the State, and that instruction shall be conducted in the English language, there was in the Constitution of 1850 and the prior Constitution no restrictions upon the power of the legislature to establish a primary

school system. *Perrizo v. Kesler*, 93 Mich. 280 (53 N. W. 391); *Pingree v. Board of Education*, 99 Mich. 404 (58 N. W. 333). No other restrictions are found in the Constitution of 1909, save the one, article 10, § 1, that all subjects of taxation now contributing to the primary school interest fund under present laws shall continue to contribute to that fund, etc. Generally, the whole subject of education is for legislative consideration and control, and it is for the legislature to determine, within other constitutional restrictions of its power, in what manner and by what means schools and the means of education shall be encouraged. It is not contended, and cannot reasonably be claimed, that the legislature may not establish a system, both for primary and other public schools, which shall fix the pay, or the salary, of public school-teachers, with regulations relating to the age, period of service, and retirement of teachers. If it may do this, it may likewise determine whether it is wise and in the general interest of education that in the system it establishes provision be made for retired teachers whose qualifications for teaching, periods of service and salaries it may control. Having made such a provision, it is for the courts to determine whether the legislature has traveled beyond any other constitutional limitation upon its powers.

In this proceeding, there is properly involved no question of the exercise of the taxing power of the State. Taxes may be levied, now as heretofore, to support public schools and encourage and foster education. No question of legislative interference with the private right to make contracts is involved, because the right of a school district to make contracts with teachers is not a private right. And while teachers are not public officers, they, like all other persons who engage in public service, are controlled by legislative limitations upon the powers of the municipal

district with which they enter into contract relations.

The act cannot be called *class* legislation. Included in any system of education must be a provision for teachers and for paying them. Teachers render services which are essentially public services. Their avocation, if pursued, sets them apart, in a class. They each become a working unit in the system of education devised by the legislature pursuant to constitutional direction. Any legislation which affects the qualifications, period of service, or reward of teachers acts upon this class. The legislation in question does no more. It is true that one possessing all of the necessary qualifications for teaching does not become one of the class except by contracting to teach. But he must make such a contract as the school district may make. Whether such contracts will encourage and promote education is a matter for the legislature to determine, and, perhaps, for experience to prove, or disprove.

Nor does the act, in its general scheme and purpose as an amendment of the school system, deprive any person of his property. I mean by this that, looking to the purpose of the legislation, it takes nothing from any person. While it speaks of contributions from teachers, still, all of its provisions being considered, it is apparent that the salary to be paid by each school district, to each teacher, is the net, and not the gross, amount of salary agreed upon.

The reasoning so far employed denies the contention that the act in its general purpose authorizes an expenditure of public money for private purposes. It admits, and it is a necessary corollary to the general proposition I have sustained, that the fund which the act seeks to create is a public fund, devoted, it is true, to purposes of education, but beyond the control of any individual, in which the teacher has no private interest and can have none until the happening of the

event upon which private interest is made to depend. Except for this act, the proportion of primary school money which each district receives is devoted to the payment of teachers' wages, or to what is made there-to equivalent (4 How. Stat. [2d Ed.], § 9897, 2 Comp. Laws 1915, § 5678), but a devolution not, however, binding upon the legislature.

While the legislation in respect to its general purpose, and in respect to the legislative power to accomplish the general purpose, may be unobjectionable, it may be that insuperable objections exist to carrying it into effect according to its terms. The argument, and I think the only argument which can be made to sustain the general power of the legislature in this direction, sustains the necessary corollary that the system of education to be established and controlled by the legislature must be one operating uniformly throughout the State, upon all affected persons and in all school districts. As matter of fact, this is the history of all prior general legislation upon the subject. The amendment considered here operates in a part of the State only, and not uniformly upon all persons affected by it. It is made operative in the city of Detroit by election. The school district of the city is excluded, not upon any attempted classification of districts according to the idea that the act ought to be applicable in some and not in others, but because there is there a local retirement fund for teachers.

It is not, however, the case of mere exclusion of certain territory and the inhabitants therein from the operation of a general law. There are two laws upon the general subject, each affecting persons, teachers, as they may or may not be employed in a particular school district. As affecting the status of the teacher, years of service in Detroit count, under the law we are considering, as much as years of service elsewhere in the State. This is an advantage to the teacher

who, having been employed in Detroit, seeks service elsewhere. On the other hand, a teacher, employed elsewhere, who obtains employment in Detroit, is, by accepting a position there, automatically excluded from participation in the fund which the act creates. The purpose to continue the local law is evident.

Although the fund sought to be created is devoted to public schools, and although the legislature has practically plenary powers in the matter of the system of public schools, there are some constitutional restrictions upon the legislative power to use the fund, in the system, to create a system which shall require, or permit, certain dispositions of money. Such a limitation is found in section 3, art. 16, of the Constitution, which denies the authority of the legislature or of any *municipal authority* to grant or to authorize to any public employee or contractor extra compensation after the service has been rendered or the contract entered into. This constitutional provision excludes, I think, as grounds for the appropriation of public moneys, all considerations of charity or gratitude, except that poor persons must be supported by the public.

"Extra compensation is compensation over and above that fixed by contract or by law when the services were rendered." *Mahon v. Board of Education*, 171 N. Y. 263, 266 (63 N. E. 1107, 1108, 89 Am. St. Rep. 810).

There is no reason for now affirming or denying the proposition that under our Constitution the State may reward distinguished public service, with a view to the promotion of loyalty and patriotism. *Opinion of the Justices*, 175 Mass. 599 (57 N. E. 675, 49 L. R. A. 564); *Opinion of the Justices*, 186 Mass. 603 (72 N. E. 95); *Opinion of the Justices*, 190 Mass. 611 (77 N. E. 820); *Mead v. Inhabitants of Acton*, 139 Mass. 341 (1 N. E. 413). The act does not purport to do

any such thing as that. Nor, as framed, does it extend to all teachers affected by it an inducement to work for moderate pay and to continue in service. If it did, the pension or annuity might be, and I think should be, regarded as not *extra* compensation. But, in terms, the act grants what may be termed a pension to some teachers under contract to teach when it became effective, and it extends its benefits in a measure to certain public elective officers, with salaries, and to others employed wholly outside of the system of public schools.

For the reason that the act, in operation and by its terms, will grant extra compensation to certain persons within the meaning of the constitutional provision, for the further reason that the repeal of the local act governing the Detroit school district, a part of the charter of the city, is left to the determination of a majority of school-teachers (no provision being made for determining the will of the majority nor for enforcing it), and to the electors of the school district, and for the further reason that it is impossible to say that with the objectionable portions of the law eliminated the legislature would have passed it, the act must be held to be invalid, and judgment of ouster entered.

No adjudicated case in which parallel facts were considered is cited. Some of the authorities, to many of which we were referred by counsel, which have been examined, are: 1 Dillon Mun. Corp. (5th Ed.) § 430 *et seq.*; *Pennie v. Reis*, 80 Cal. 266 (22 Pac. 176); *Id.*, 132 U. S. 464 (10 Sup. Ct. 149); *State, ex rel. Risch, v. Board of Trustees*, 121 Wis. 44 (98 N. W. 954); *Hughes v. Traeger*, 264 Ill. 612 (106 N. E. 431); *Pecoy v. City of Chicago*, 265 Ill. 78 (106 N. E. 435); *Ball v. Board of Trustees*, 71 N. J. Law, 64 (58 Atl. 111); *Allen v. Board of Education*, 81 N. J. Law, 135 (79 Atl. 101); *State, ex rel. Heaven, v. Ziegen-*

hein, 144 Mo. 283 (45 S. W. 1099, 66 Am. St. Rep. 420); *Commonwealth v. Walton*, 182 Pa. 373 (38 Atl. 790, 61 Am. St. Rep. 712); *Commonwealth v. Barker*, 211 Pa. 610 (61 Atl. 253); *State, ex rel. Ward, v. Hubbard*, 22 Ohio Cir. Ct. R. 252, affirmed 65 Ohio St. 574 (64 N. E. 109, 58 L. R. A. 654); *Friel v. McAdoo*, 101 App. Div. 155 (91 N. Y. Supp. 454), affirmed 181 N. Y. 558 (74 N. E. 1117); *Trustees of Exempt Firemen's Fund v. Roome*, 93 N. Y. 313 (45 Am. Rep. 217); *People, ex rel. Waddy, v. Partridge*, 172 N. Y. 305 (65 N. E. 164); *State, ex rel. Haberman, v. Love*, 89 Neb. 149 (131 N. W. 196, 34 L. R. A. [N. S.] 607, with note, Am. & Eng. Ann. Cas. 1912C, 542); *State, ex rel. Jennison, v. Rogers*, 87 Minn. 130 (91 N. W. 430, 58 L. R. A. 663); *Stevens v. Relief Ass'n*, 124 Minn. 381 (145 N. W. 35, 50 L. R. A. [N. S.] 1018); *People, ex rel. Manufacturing Co., v. Board of State Auditors*, 9 Mich. 327; *Smith v. Auditor General*, 80 Mich. 205 (45 N. W. 136); *Beach v. Bradstreet*, 85 Conn. 344 (82 Atl. 1030, Am. & Eng. Ann. Cas. 1913B, 946).

BROOKE, J. My Brother OSTRANDER in his opinion holds that the act under consideration is:

First. Not class legislation.

Second. That it deprives no person of property without due process of law.

Third. That it does not authorize the expenditure of public money for a private purpose.

Fourth. That it is unconstitutional because, as framed, it authorizes the taking of extra compensation within the meaning of section 3, art. 16, of the Constitution.

Fifth. That it is unconstitutional because of provisions of section 14, which excepts the city of Detroit from its operation.

With reference to the fourth point my Brother says:

"Nor as framed, does it extend to all teachers an inducement, certainly not an equal inducement, to

work for moderate pay and continue long in service, in which case the pension or annuity might be, and I think should be, regarded as not extra compensation."

Under this head the argument is made that the act violates the Constitution because it does not extend an inducement (or an equal inducement), to those teachers in service under contract when the act became effective, nor to certain persons who are made beneficiaries of the act, though not employed in the public school system. This, I take it, means that no inducement is extended to public school teachers under contract when the act took effect, nor to those engaged in educational work in State institutions outside of the public schools, nor to elective educational officers like county school commissioners. I am unable to agree with this conclusion. The educational system is not limited to public schools. It is as much the province of the legislature to promote the efficiency of other departments of the educational system as to promote that of the public schools. The Constitution (section 1, art. 11) provides that:

"Schools and the means of education shall forever be encouraged."

Section 2 provides for the election of a superintendent of public instruction, whose "duties and compensation shall be prescribed by law," and in section 10 it is provided that the legislature shall maintain certain enumerated institutions "and other educational institutions as may be established by law." Whether these other departments of the educational system shall be included in the benefits of a retirement fund is, in my opinion, a matter of legislative discretion. The act under consideration holds out its benefits to all those in educational service when it took effect, whether that service be rendered under contract, through appointment, or by virtue of election; but those benefits are available only upon conditions in-

volving efficiency and continued service. Contracts will not be renewed, reappointments and re-elections will not be secured, unless the service of these employees has, in the past, been found to be satisfactory. There is then an inducement held out to these, as well as to those entering service after the passage of the act, so to perform their duties as to secure continued employment, and this inducement, in view of the classification of the employees according to length of service contained in the act, in my opinion, cannot properly be said to be unequal. It is to be noted that in *Mahon v. Board of Education*, 171 N. Y. 263 (63 N. E. 1107, 89 Am. St. Rep. 810), whose definition of extra compensation is quoted in support of the argument under consideration, it is conceded that it would not be extra compensation to include in the benefits of the teachers' pension system those already in employment when the act took effect.

It seems to me to be immaterial whether the inducement be greater or less, for that obviously depends upon the circumstances of the individual. The test would appear to be: Will those to whom the benefits of the act are extended be induced thereby to render better and longer service? Public interest is subserved, not only by inducing persons who are not in the public service to enter, but as well in inducing competent persons already in public employment to continue in it and to render better service, so that they may secure such continuance. Teaching should be made a vocation instead of a stepping stone to another profession, and anything which tends to make the present educational force so regard it is a distinct public benefit.

My Brother OSTRANDER holds the act invalid because of the provisions of section 14. Under the terms of section 14, the act is not to apply to the city of Detroit (where for a number of years a local retire-

ment fund has existed under the provisions of a special statute), until that fund shall be discontinued through local action. The argument is made that this provision destroys the general character of the act, and constitutes a violation of section 30, article 5, of the Constitution, which prohibits the legislature from passing any local or special act where a general act can be made applicable. This position rests upon the assumption that a general law must apply to every portion of the State, and must operate uniformly in each portion, unless different regulations are applied to different districts upon some proper principle of classification. Assuming that this argument is sound, it does not follow that a general law must, to be valid, repeal all local acts which provide regulations for their respective localities different from those of the general act covering the same legislative object. That a proper classification does not destroy the general character of legislation has been determined in this State. *Hayes v. Auditor General*, 184 Mich. 39 (150 N. W. 331); *Burton v. Koch*, 184 Mich. 250 (151 N. W. 48), and cases cited. A valid classification in a general law must be based upon some real difference or distinction. What could be more reasonable, in an act creating a retirement or pension fund for each of the school districts of the State, than to except therefrom by way of classification such school districts as already have such a law? The general object and purpose of the act is to establish a fund for the payment of annuities or pensions to school-teachers, and if in any school district of the State such a fund has already been established, there was no occasion to make the act applicable to such districts in order to accomplish the object of the act, for the result is that all the school districts in the State after its enactment have retirement or pension funds. I am therefore of opinion that the first portion of section

14 is a valid exercise of the legislative power. That portion of this section following the words, "provided however," is in form a proviso to the preceding proviso or exception, but in reality it is substantive legislation, in that it undertakes to provide a method by which a local teachers' retirement fund may be turned over to the State and be placed in its treasury to be administered by the State retirement fund board, created by the act. Whether it was within the constitutional power of the legislature to provide this method of initiating an election need not now be determined. The occasion may never arise where action is sought under the power of initiation provided. If in the future action is attempted, its validity, in a proper proceeding, may be determined.

The demurrer should be sustained, and the application dismissed.

STONE, C. J., and KUHN, MOORE, STEERE, and PERSON, JJ., concurred with BROOKE, J. BIRD, J., did not sit.

MICHIGAN STATE TELEPHONE CO. *v.* MICHIGAN
RAILROAD COMMISSION.

1. TELEGRAPHS & TELEPHONES—RAILROAD COMMISSION—ORDERING
CONNECTION—VALIDITY OF ORDER.

Under the authority granted to the railroad commission by virtue of the terms of Act No. 206, Pub. Acts 1913, 2 Comp. Laws 1915, § 6689 *et seq.*, the power of the commission to require a physical connection extends only to two or more persons, copartnerships, or corporations operating

telephone lines which can be made to form a continuous line of communication. It gives the power to order a physical connection whenever and wherever those lines by such connection can be made to form a continuous line of communication whether between the different towns or between subscribers in the same town.

2. SAME—DUE PROCESS OF LAW—EMINENT DOMAIN—CONSTITUTIONAL LAW.

The enforced physical connection between the lines of two companies would be an exercise of the right of regulation, and would not amount to such a taking as could only be justified by the power of eminent domain.

3. SAME—DISCRIMINATION—STATUTE.

The relations of a telephone company in this State are not simply with its own subscribers, but with the public generally, and it is forbidden by law to make any discrimination between persons. 2 Comp. Laws 1915, § 6688.

4. SAME—RAILROAD COMMISSION—REASONABLENESS.

Since the regulation of public utilities by the State is thus, and necessarily, an interference to some extent with private property, it can be justified only by the demands of public convenience and necessity, and the regulation must be reasonable having in view the public interest to be subserved and the extent of the burden imposed.

5. SAME—NECESSITY—PUBLIC CONVENIENCE.

The statute does not require that the public necessity be peculiar to the particular case, for the existence of a public necessity in each particular case is not diminished by the existence of the same public necessity in all cases; and, under said Act No. 216, Pub. Acts 1913, 2 Comp. Laws 1915, §§ 6689-6714, the question whether public convenience and necessity require physical connection of competing telephone lines in a particular case is a question of fact in every instance, the result of competition varying in different localities. If there is a public need of the connection the statute is satisfied.

6. SAME—DECREE—CHARGES—EVIDENCE.

Held, on an appeal from a decree for the defendant railroad commission, in a suit to test the validity of an order requiring the complainant and Citizens' Telephone Company to connect their systems for toll line service in Traverse City, that the needs of the locality justified an order of the commission to the effect aforesaid and that

its fixing of charges was not an abuse of discretion. The burden was on complainant to show that the connection would inflict undue loss upon it and one that could not be avoided by adjustment of the rates, tolls and charges.

Appeal from Wayne; Van Zile, J. Submitted June 23, 1916. (Docket No. 145.) Decided December 21, 1916.

Bill by the Michigan State Telephone Company against the Michigan Railroad Commission to vacate an order requiring certain physical connections with the Citizens' Telephone Company. From a decree for defendant, complainant appeals. Affirmed.

Stevenson, Carpenter, Butzel & Backus (Thomas G. Long, of counsel), for complainant.

Grant Fellows, Attorney General, and *David H. Crowley*, Assistant Attorney General (*Edwin H. Lyon* and *William A. Bahlke*, of counsel), for defendant.

PERSON, J. On the 11th day of June, 1914, the Michigan railroad commission made an order:

"That the Michigan State Telephone Company and the Citizens' Telephone Company, two Michigan corporations, make such a physical connection or connections between their toll lines or systems, in the city of Traverse City as is required for the furnishing of toll line service to the subscribers of each company at the stations installed in their residences and places of business over the toll lines of the other company."

The order was granted upon the petition of certain residents of Traverse City, who are said to represent in their application a large number of their fellow townsmen. Complainant, as one of the companies affected by the order, brings this suit, under the provisions of the statute, asking that it be vacated and set aside.

It appears from the record that both the Michigan State Telephone Company and the Citizens' Telephone Company have exchanges in Traverse City. The Citizens' Company has by far the larger number of local subscribers, 1,740 as against 479 of the Michigan Company, but the latter has the more extensive toll system, and handles a larger number of outgoing and incoming messages. The lines of the latter company not only afford better long-distance facilities, but reach every, or nearly every, city and village in the vicinity of Traverse City, while those of the Citizens' Company fail to reach a number of important neighboring towns. Testimony was given explaining the telephonic connection of Traverse City with the exchanges in about 50 other places in that part of the State. For the purpose of more clearly understanding the situation these places may be roughly divided into three groups.

In the first of these groups, comprising more than half of the places considered, the Michigan Company operates the only exchange now in existence. Formerly there were two exchanges in each of these towns, the one owned and operated by the Michigan Company, and the other by what was known as the Swaverly Company. At that time the Citizens' Company in Traverse City and other so-called independent companies in other places were connected with the exchanges of the Swaverly Company so that the subscribers of the one could talk with the subscribers of the other. About March, 1912, the Michigan Company purchased from the Swaverly Company all of its property and business and united the exchanges of the latter company with its own. But as a condition of the merger it was required by the railroad commission that the Citizens' Company should be allowed to continue the same connection with the exchanges thus consolidated that had before existed with the Swaverly

exchanges. As a result of this requirement the toll lines of the Citizens' Company have continued to be, and are, connected with the switchboards of the consolidated exchanges in all of these Swaverly towns, as we will call them, so that the subscribers of either company in Traverse City are able to talk with the subscribers of the Michigan Company in the 30 or more Swaverly towns as if they were all reached by the same telephone system. In addition to these so-called Swaverly towns, there are a large number of places in the southeastern part of the State, including the city of Detroit, with which the holders of Citizens' telephones have the same kind of connection, and from the same cause. With the towns in this group the present order of the commission will afford no new or additional facilities of communication to the residents of Traverse City.

In the second of the groups into which we have divided the towns around Traverse City, full competition still exists between the two telephone companies. There are in this group about nine cities and villages, and between these towns and Traverse City the Michigan Company and the Citizens' Company has each its own toll line, and in them each maintains its own exchange. As between Traverse City and these towns the subscribers of one company cannot talk from their own telephones with the subscribers of the other, and will not be able to do so unless the physical connection is made between the lines of the two companies as required by the order of the railroad commission.

The third group is also composed of some nine or ten towns, and includes places of considerable importance. In these towns the Michigan Company has the only exchanges and its toll lines are the only ones connecting them with Traverse City. With the residents of these towns the subscribers of the Citizens' Company in Traverse City have no telephonic communica-

tion except by becoming subscribers of the Michigan Company, or by going to the public stations of that company.

Traverse City, according to the census of 1910, has a population of more than 12,000. It has wholesale and jobbing concerns patronized by merchants of surrounding communities. And it is the site of the Traverse City State Hospital for the Insane, which receives patients from the thirty-seven counties of the northern portion of the lower peninsula. The business men of the city must necessarily have telephonic communication, not only with residents of the city, who mostly use the Citizens' telephone, but also with towns of the third group, which can be reached only over the lines of the Michigan Company. This forces a duplication of instruments, and there are 188 subscribers in the city who feel obliged to, and do, keep both telephones. And in asking for the order in question it was the object of petitioners to obviate the expense of two telephones, where one could be made to answer the purpose of both, and to bring about the same facilities of communication among telephone subscribers in the city, and between them and the towns of the second and third group, that they now have with the numerous towns of the first, or Swaverly, group, and with the towns and cities in the southeastern part of the State.

Upon the hearing of the case in the circuit court the order of the commission was upheld and a decree entered dismissing complainant's bill. From this decree complainant, the Michigan State Telephone Company, appeals to this court.

The power of the railroad commission to regulate the business of telephone companies is to be found in Act No. 206 of the Public Acts of 1913 (2 Comp. Laws 1915, §§ 6689-6714), and authority to require the physical connection of telephone lines is contained in section 6 of the act, which reads as follows:

"Whenever the commission, after a hearing had on its own motion or upon complaint of any party in interest, shall find that a physical connection can reasonably be made between the lines of two or more persons, copartnerships or corporations operating telephone lines, whose lines by such connection can be made to form a continuous line of communication, and that public convenience and necessity will be subserved thereby, or shall upon like motion or complaint find that two or more persons, copartnerships or corporations so operating telephone lines have failed to establish joint rates, tolls or charges for service by or over their said lines, the commission may by its order require that such physical connection be made, and may prescribe through lines and joint rates, tolls and charges to be made and to be used and observed in the future. If such persons, copartnerships or corporations so operating telephone lines and telephone facilities do not agree upon the division between them of the cost of installing of such physical connection or connections, or the division of any joint rate, tolls or charges established by the commission over such through line, the commission shall have authority after hearing to establish such division."

Upon considering this section of the act, it will be observed in the first place, that the railroad commission is given no authority by the statute to require a physical connection between the lines of two or more persons, copartnerships, or corporations operating telephone lines, unless the lines, by such connection, "can be made to form a continuous line of communication." Complainant insists that this means a "continuous line of communication" between places not already connected by any telephone line, and that it does not apply to such a situation as that at Traverse City, which is now connected with practically all other places by the lines of the Michigan Company. If the lines of the Michigan Company, counsel say, in illustrating their position, ran only from Charlevoix to Traverse City, and the lines of the Citizens' Company ran only from Traverse City to Cadillac, then the lines might be re-

quired to connect so as to form a continuous line of communication between Charlevoix and Cadillac. And counsel argue that the statute should be so construed as to authorize the requirement of physical connection between telephone lines only in situations substantially covered by the illustration. In other words, it is counsel's position that in the hypothetical case connection of the lines might be required, under the statute, so that subscribers of the Citizens' Company in Cadillac could talk with subscribers of the Michigan Company in Charlevoix, but that it could not be required so that subscribers of the Citizens' Company in Traverse City should have the same privilege. In this we think counsel for complainant attempt to read into the statute a limitation not expressed by its language. There is nothing said about existing lines of communication, or the absence of such lines. Nor is the continuous line spoken of restricted to communication between different towns and cities. We think the statute must be held to give the commission authority, if other necessary conditions exist, to order a physical connection of telephone lines whenever and wherever those lines "by such connection can be made to form a continuous line of communication," whether the communication is between different towns or between subscribers to different telephones in the same town.

Complainant also claims that an enforced physical connection between its lines and those of the Citizens' Company would not be an exercise of the right of regulation, but would amount to such a taking of its property as could be justified only under the power of eminent domain and upon the payment of compensation. As the basis of this contention, it is argued that the Citizens' Company would be given the use and control of complainant's lines every time one of its subscribers talked over them by means of the connection. In support of this position our attention is directed to *Pacific*

Telephone & Telegraph Co. v. Eshleman, 166 Cal. 640 (137 Pac. 1119, 50 L. R. A. [N. S.] 652, Am. & Eng. Ann. Cas. 1915C, 822). With all due respect for that court, however, we find ourselves unable to agree with its conclusion as to the effect of a connection between competing lines. The business of a telephone company is to transmit oral messages from one point to another, and for that purpose every patron, whether he is a subscriber or not, has the use of its lines for the time being. That is the public use to which they are dedicated. Without the physical connection each subscriber to a Citizens' telephone is entitled to the same use of complainant's lines that he would have with the physical connection; the difference being that with the lines connected he can talk from his own telephone, while without the connection he would be obliged to go to a public station of complainant company. The relations of a telephone company in this State are not simply with its own subscribers, but with the public generally, and it is forbidden by law to make any discrimination between persons. 3 How. Stat. (2d Ed.), § 7221, 2 Comp. Laws 1915, § 6688. Complainant would have the same control over its own lines if the Citizens' subscriber should talk from his house or office that it would have if he should talk from one of complainant's public stations; and complainant, not the Citizens' Company, would receive compensation for the use of the lines. It would amount simply, so far as this phase of the matter is concerned, to a difference in the way messages were got to and from the Citizens' subscribers, and would be, not a taking of property by eminent domain, but a regulation in the interest of the public. This conclusion, we think, is in accordance with the weight of authority. *Pacific Telephone & Telegraph Co. v. Wright-Dickinson Hotel Co.*, 214 Fed. 666; *Pioneer Telephone & Telegraph Co. v. State*, 38 Okl. 554 (134 Pac. 398); *Wis-*

consin Telephone Co. v. Railroad Commission, 162 Wis. 383 (156 N. W. 614, L. R. A. 1916E, 748).

In one sense there may be, and often is, a taking of property through the legitimate exercise of the power of regulation, and as necessarily incident thereto. In such case the company whose business is subjected to the regulation is not deprived of the title to or possession of its property, but it may be required to forego profits which it might otherwise receive; to apply its property, within the dedicated use, to some purpose contrary to its wishes; to expend its money as it would not otherwise expend it; to perform service it would not perform except for the regulation; and to submit to losses which it would prefer to avoid. In *Wisconsin, etc., R. Co. v. Jacobson*, 179 U. S. 287 (21 Sup. Ct. 115), the railroad company was required to expend its money for a railroad connection, and to submit to certain losses in revenue. In *Chicago, etc., R. Co. v. Iowa*, 233 U. S. 334 (34 Sup. Ct. 592), the company was required to accept and transport loaded cars received from other railroads, although it was willing and desired to use its own cars for the purpose. In *Mayor, etc., of Worcester v. Railroad Co.*, 109 Mass. 103, the company was subjected to heavy expenses in establishing a union depot. And see *Oregon R. R. & N. Co. v. Fairchild*, 224 U. S. 510 (32 Sup. Ct. 535); *Pittsburg, etc., R. Co. v. Railroad Commission*, 171 Ind. 189 (86 N. E. 328); *Grand Trunk R. Co. v. Railroad Commission*, 231 U. S. 457 (34 Sup. Ct. 152), and many other cases. These relate mainly, if not wholly, to the connection of railroad tracks, but the principles announced are applicable to the control of any public utility by the State.

Inasmuch as the regulation of public utilities by the State is thus, and necessarily, an interference to some extent with private property, it can be justified only by the demands of public convenience and necessity;

and the regulation must be reasonable, having in view the public interest to be subserved and the extent of the burden imposed. *Oregon R. R. & N. Co. v. Fairchild*, *supra*; *Great Northern R. Co. v. Minnesota*, 238 U. S. 340 (35 Sup. Ct. 753).

The commission has found that the physical connection of telephone lines as directed by the order in question is a public convenience and necessity, and we think it had sufficient grounds for that conclusion. The telephone has become a vital element in the business and social life of the people, and enters so largely into the conduct of all of their affairs that the elimination of unnecessary expense and the saving of time in its use have become matters of importance. Men can no longer afford to loiter around public pay stations for the purpose of sending or receiving messages, and the duplication of instruments in the house and office has grown into a waste of large proportions. These evils come largely from the existence of competing companies in the same community, and so far as reasonable regulation can improve the situation such regulation is assuredly required by public convenience and necessity. Communities should not be held up until one or the other of adverse companies has been eliminated through the long battle of competition, if the delay can be justly and lawfully avoided. This was evidently the view of the legislature when telephone companies were brought under the control of the railroad commission, and that body was given the powers of regulation conferred by the statute referred to. It is suggested, however, by counsel for complainant, that the evils mentioned as furnishing grounds for regulation in the interest of the public are evils common to all competition between telephone companies, and could not have been within the contemplation of the legislature when it required in each case, before action by the commission, a special

finding that public convenience and necessity would be subserved thereby. In answer it may be remarked that the existence of a public necessity in each particular case would not be diminished by the existence of the same public necessity in all cases. And the results of competition must vary as between different localities, so that the question remains in every instance whether public convenience and necessity requires action on the part of the State in that particular case. It is also suggested by complainant that the connection of lines at Traverse City is not necessary because the residents of that city can rid themselves of the troubles of which they complain by surrendering their Citizens' telephones and substituting those of the complainant company. This is the solution that competition always holds out to the public. But experience has shown that it is not a very practical solution, and it ignores the necessities of the outside public which requires facility of communication with Traverse City as much as Traverse City requires facility of communication with the outside public. And this public necessity spoken of in the statute is not an absolute necessity. We agree with the supreme court of Wisconsin that:

"If there was a strong or urgent need of the connection here sought, then there was a necessity for it." *Wisconsin Telephone Co. v. Railroad Commission, supra.*

And there was evidence justifying the commission in finding the existence of such need.

That a physical connection may be required, in many instances at least, between the lines of competing companies without injury to either, is clearly shown by the record in this case. The toll lines of the Citizens' Company and those of the Michigan Company both run into the same exchanges in the 30 cities and villages of the Swaverly territory, as well as into the

exchanges of the more numerous places in the southeastern part of the State. While this arrangement may not constitute a technical connection of the lines, it yet has the effect as to toll service of a physical connection. Neither party complains of injury from this mutual service, while the results are unquestionably beneficial to the public. And complainant may well be required by the commission to extend the same facilities generally to the residents of Traverse City unless it has been able to show some insuperable objection to doing so.

The objection complainant does raise as to the reasonableness of the order in question relates entirely to its effect upon its local exchange in Traverse City. That exchange, it says, will be destroyed if the order goes into effect. It bases this conclusion upon the fact that the business houses of the city find it necessary, without the connection, to use its telephone in communicating with the towns in the third group, as we have classified them, to which complainant has the only toll line. These telephones will be no longer required, it says, if, by means of the connection, these towns can be reached from the telephones of the Citizens' Company. And it further claims that with the removal of its telephones in the city the value of its toll service with the Swaverly towns must be much impaired.

Undoubtedly complainant might suffer some loss if these results should in fact follow the enforcement of the order; yet just what the loss might amount to we are unable to determine with any accuracy from the record. But we do not think that complainant has shown with sufficient certainty that the apprehended results would in fact follow the enforcement of the order. And it is insisted by the railroad commission that they would not. The commission has full power under the statute to prescribe the joint rates, tolls,

and charges to be made for the use of the connection and to determine the division of such rates, tolls, and charges if the parties interested fail to agree upon the division. In fixing these rates, tolls, and charges the commission seems to have a very large discretion, and while unquestionably they must be reasonable when all the circumstances affecting the situation are taken into consideration, yet they are not necessarily limited to the actual cost of operation or even to an ordinary profit thereon. In fixing the rates, tolls, and charges, the commission may undoubtedly take into consideration all of the equities growing out of the regulation and make use of the rates in adjusting those equities. This the commission says it intends to do, and it has retained jurisdiction of the matter for the purpose of fixing and adjusting the rates, tolls, and charges if the parties themselves fail to agree upon them. And the commission insists that a proper adjustment of rates, tolls, and charges will prevent the injurious results anticipated by complainant. It is the purpose of the commission, it says, not to make use of the rates, tolls, and charges by way of compensation, but to prevent the occurrence of loss. In other words, a proper adjustment of the rates, tolls, and charges will, in the judgment of the commission, remove all inducement on the part of complainant's subscribers in Traverse City to discard the telephones they now hold from complainant, and thereby to injure its local exchange.

Will the adjustment of the rates, tolls, and charges, when properly made, remove the danger of destruction of its local exchange which complainant fears? The whole thing, both as to the danger of loss and as to the remedial provisions intended by the commission, is somewhat a matter of speculation. It is for complainant to show affirmatively that the physical connection ordered by the commission will inflict upon it

an undue loss and one that cannot be prevented by the contemplated adjustment of rates, tolls, and charges. The interest of the public in a proper regulation of public service corporations is continually becoming more vital and important, and any action of the State through its organized boards and commissions in the exercise of that power should not be set aside by the courts, except in instances of the clearest necessity. This is the view taken by the legislature. Section 18 (2 Comp. Laws 1915, § 6706) of the act explicitly declares that:

"In all actions under this section the burden of proof shall be upon the complainant to show by clear and satisfactory evidence that the order of the commission complained of is unlawful or unreasonable, as the case may be."

What rates would be required to prevent the surrender of complainant's telephones by such residents and business houses of the city as now employ them is not shown by the record. Nor is it shown that an adjustment of rates, tolls, and charges by the commission under its powers as we have construed them could not be so made as to obviate the injurious results which complainant apprehends from an enforcement of the order. And from the very nature of the order it is within the power of the commission to rescind it if it is found to operate unduly to complainant's injury.

For these reasons, the decree appealed from will be affirmed, with costs to the defendant.

STONE, C. J., and KUHN, OSTRANDER, BIRD, MOORE, STEERE, and BROOKE, JJ., concurred.

McMANIGLE v. DETROIT UNITED RAILWAY.

STREET RAILWAYS—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—DIRECTED VERDICT—SIGNALS.

Where plaintiff started to cross a wye of defendant's tracks to reach a car which he purposed to board, and was obliged to pass in the rear of a standing car that was about to back up to turn about on the intersection, and no warning or signal was sounded to indicate the intention to back, as required by an ordinance of the municipality, known to the plaintiff, and there was no conductor on the rear platform, as also required by ordinance, the trial court erred in directing a verdict for defendant on the ground that plaintiff did not look after he left the curb, in taking five or six steps and passing behind the standing car. He was entitled to assume that the servants of defendant would conform to the provisions of the ordinance and the standing car would not back up without a conductor at the rear to sound a warning or take necessary precautions.

Error to Wayne; Van Zile, J. Submitted June 22, 1916. (Docket No. 29.) Decided December 21, 1916.

Case by Archibald J. McManigle against the Detroit United Railway for personal injuries. Judgment for defendant on a directed verdict. Plaintiff brings error. Reversed.

Charles T. Wilkins, for appellant.

Corliss, Leete & Moody (*Frederick T. Harward*, of counsel), for appellee.

PERSON, J. On the 12th day of June, 1913, plaintiff was hit by a street car on Dix avenue, in the city of Detroit, and severely injured. At the trial a verdict was directed for defendant upon the ground that plaintiff was guilty of contributory negligence.

Dix avenue runs in an easterly and westerly direction, and upon it defendant has a double track for its cars. The northerly track is used for west-bound cars, and the southerly track for cars going east. Livernois avenue intersects Dix avenue from the north, but does not extend beyond it towards the south. Livernois avenue also has a double street car track, and cars coming down it towards the south turn by means of the westerly leg of a "Y" upon the northerly track on Dix avenue, back up towards the east, and then turn north on the easterly leg of the "Y" to the east track on Livernois avenue. On the day in question, a Sherman street car had come down Livernois avenue from the north, run out on the west leg of the "Y," and backed to the east on the north Dix avenue track to a point near the east leg of the "Y," where it stood with the front end towards the west and the rear end towards the east. About the same time a Springwells car was run in from the west on the southerly Dix avenue track and stopped with the end of the car a little farther east than the rear end of the Sherman street car. The Springwells car reversed its trolley and prepared to start west. It was what is sometimes called a "double-ender" with platforms for the entrance of passengers at each end. The steps to the platform at the east end were on the north side of the car and at the west end on the south side.

In determining whether a plaintiff's proofs show a *prima facie* cause of action, it is always necessary that they be construed as strongly in his favor as is reasonably possible. *Putnam v. Railway*, 164 Mich. 342 (129 N. W. 860). So construed, the particular facts of the injury were as follows: Plaintiff, with a friend named Hayes, was standing on the north sidewalk of Dix avenue, nearly north of the west end of the Springwells car; and, wishing to go in the direction that car would take, they started across the street

to enter it by the easterly platform. There is an ordinance of the city of Detroit requiring a conductor, as well as a motorman, upon every car, and another ordinance making it the duty of the conductor to be upon the rear platform and give warning to pedestrians and vehicles whenever the car is about to be backed. In going to the Springwells car from where they stood, it was necessary for plaintiff and Hayes to pass in the rear of the Sherman street car, but just how many feet from that car it is not definitely shown. Both were aware of the ordinance mentioned, and just as they were leaving the sidewalk both noticed that there was no conductor on the rear platform of the Sherman street car. They believed it would not start until he was there, and thought they could pass to the Springwells car in safety. From the northerly curb on Dix avenue to the north rail of the northerly track on that avenue, it is 15.4 feet. Both say that the Sherman street car was standing still when they started, and without any indication that it was about to be moved. Hayes was ahead and got across the northerly track on Dix avenue in safety; but plaintiff, who was just behind him, was struck by the Sherman street car, which had begun to back, without the conductor being on the rear platform, or any warning from him. It is conceded that plaintiff did not take another look at the Sherman street car after he left the sidewalk, and it was for this that the trial court held him guilty of contributory negligence.

We cannot agree with the trial court in that conclusion. If the car had been moving when plaintiff looked at it as he was leaving the sidewalk, the situation would have been different; or, if there had been any indication that it was about to be backed, he should have been upon his guard. But he is not to be charged with the duty of assuming that the car might be backed in violation of the ordinance. Defendant calls atten-

tion to plaintiff's admitted knowledge of the fact that the car would have to be backed farther before it could turn onto the east leg of the "Y"; but, even knowing this, plaintiff had the right to assume that it would not be backed until the conductor was on the rear platform to give notice and warning. Plaintiff and Hayes were walking rapidly, and it was only five or six steps from the curb to the northerly track. People were getting on the Springwells car and it was about to start. Under these circumstances, we do not think it can be said that plaintiff was guilty of contributory negligence as matter of law. We think, rather, that the case is governed by the principles laid down in *Putnam v. Railway*, *supra*, and the cases there cited.

The judgment is reversed, with costs, and a new trial ordered.

STONE, C. J., and KUHN, OSTRANDER, BIRD, MOORE, STEERE, and BROOKE, JJ., concurred.

CITY OF BAY CITY v. LUMBERMEN'S STATE BANK.

1. MUNICIPAL CORPORATIONS—BONDS—SALES—PRINCIPAL AND AGENT—PRICE.

By paying for an entire issue of municipal bonds of the city of Bay City at a price agreed upon, without any report of further dealings therewith by the bank, which in turn disposed of nearly all the bonds to its customers, the bank became a purchaser, not an agent, of the city, which had or claimed no interest in the proceeds of subsequent sales made to customers of the bank, and especially where the parties themselves treated the transac-

tion as a sale and so described it in the written contract executed between them.

2. SAME—COMMISSION—CONTRACTS—ILLEGALITY.

Under Act No. 720, Local Acts 1907, which authorizes the expenditure of the funds from the foregoing bond issue exclusively for the purposes of a park, the payment of \$4,000 to defendant bank as a commission for the sale of the bond issue, out of the proceeds, was unlawful and in excess of the authority granted by statute, amounting in effect to a rebate or discount.

3. SAME—ESTOPPEL.

Plaintiff city was rightly held by the trial court to be entitled to recover back the commission, so called, as the doctrine of estoppel which defendant attempted to interpose would not be held applicable to an unauthorized payment in violation of statute.

Error to Bay; Sharpe, J., presiding. Submitted June 13, 1916. (Docket No. 51.) Decided December 21, 1916.

Assumpsit by the city of Bay City against the Lumbermen's State Bank for money had and received. Judgment for plaintiff on a directed verdict. Defendant brings error. Affirmed.

Joslyn & Houghton, for appellant.

Coumans & Gaffney, for appellee.

PERSON, J. This action was brought to recover the sum of \$4,000 theretofore paid by plaintiff to defendant in connection with the sale of certain bonds, known as the Wenonah Park bonds.

By an act of the legislature, approved March 14, 1907, the city of Bay City was authorized to acquire a site for and to lay out, establish, make, alter, and regulate a public park and grounds; and for that purpose to borrow not to exceed \$200,000 and issue its bonds therefor. Section 3 of the act provided:

"If authorized by the vote of the electors, said loan shall be secured by the bonds of the city payable at such times, not less than ten years after the date of their issue, and shall bear such rate of interest, not exceeding four per cent. per annum, as said common council shall determine. The said bonds shall be indorsed 'Bay City Bonds' and numbered consecutively, and no sale thereof shall be negotiated at less than face value or par. The proceeds derived from the sale of said bonds shall be paid to the city treasurer and by him placed to the credit of a fund to be known as a public park fund. No appropriation or payment out of said fund shall be ordered by the common council, or made, except for the purpose of acquiring a site for and laying out, establishing, making and maintaining a public park and grounds." Act No. 409, Local Acts 1907.

At the same session of the legislature, and by an act approved June 27, 1907, provisions were made for the appointment of a board of park commissioners to take charge of the public parks and grounds of the city, and exercise supervision over them. The common council was required by this act to sell the bonds authorized by the preceding act and deposit the proceeds with the treasurer of the city, to the credit of a fund to be known as the "Wenonah Park fund." And it was further provided that:

"No money shall be drawn therefrom except upon the order or warrant of said commission, duly authenticated by its secretary and signed by its chairman and countersigned by the comptroller of said city. The proceeds of the sale of said bonds shall be used exclusively for paying the cost and expense of purchasing and condemning or otherwise acquiring the property herein described for said Wenonah Park, and to pay the cost and expense of laying out the grounds so acquired and improving and making same into a suitable public park, it being the intent and purpose of this act that all of the funds obtained from the sale of said bonds shall be expended exclusively for said Wenonah Park." Act No. 720, Local Acts 1907, § 11.

Section 16 of the same act reads as follows:

"Said board of park commissioners shall have power and authority to contract for the sale of and to sell at the best price obtainable, in their judgment, any buildings, building material or salvage, upon the site of said Wenonah Park; also to contract for the removal of such buildings, building material and salvage therefrom on the best terms which, in their judgment, may be obtained. The proceeds of the sale of such buildings, building material or salvage shall be paid into the treasury of Bay City and there deposited to the credit and as part of said Wenonah Park fund, to be used, expended and paid out for the purpose and in the manner in this act provided."

At the April election, following the passage of these acts, the issuance of the bonds was duly authorized by a vote of the electors; and after an unsuccessful attempt to effect their sale by advertisement, the common council received the following proposition from the defendant bank:

"BAY CITY, MICHIGAN, July 5, 1907.

"To the Honorable GUSTAVES HINE,

"Bay City, Michigan.

"*Dear Sir:* Concerning the park bonds of Bay City to be issued, I am authorized to make the following proposition: For the issue of \$200,000 we will take these bonds at par with accrued interest from date of bonds up to and including June 30, 1907, less a commission or discount of \$4,000.

"H. H. NORRINGTON,

"Vice President Lumbermen's State Bank."

In July of the same year, the ways and means committee of the common council made a report to that body, which was adopted by unanimous vote. This report read as follows:

"*Gentlemen:* We have had under consideration the matter of the sale of park bonds, and have received a proposition from the Lumbermen's State Bank to take said bonds and pay the city par and accrued in-

terest therefor, said bonds to be delivered to said bank August 1st, or as soon thereafter as possible, on condition that the park commission will pay to the said bank the sum of \$4,000 for negotiating the sale of said bonds at par and accrued interest from the receipt of rents from the buildings now located on the property intended for park purposes after the same has been acquired by the park commission. We therefore recommend that such proposition be accepted, and that the mayor and comptroller procure the said bonds at once, properly lithographed and designated Wenonah Park bonds, in form to the satisfaction of the bank's attorney."

On October 7, 1907, the bank made the following reply to this action of the common council:

"BAY CITY, MICHIGAN, October 7, 1907.

"To the Honorable MAYOR AND COMMON COUNCIL,

"Bay City, Michigan.

"*Gentlemen:* Our proposition to purchase the \$200,000 park bonds having been accepted by your honorable body with certain modifications with reference to details fully set forth in a report of your ways and means committee, adopted and approved by your honorable body July 15, 1907, we herewith accept such conditions and the provisions set forth in said report.

"Yours, etc.,

"LUMBERMEN'S STATE BANK,

"By H. H. NORRINGTON, Vice President."

After the action of the common council above recited, and prior to its acceptance by the bank, the board of park commissioners had, under date of September 9th, passed the following resolution:

"Resolved, that the authorization by the common council of Bay City to this board to pay the Lumbermen's State bank the sum of \$4,000 on the sale of the park bonds to said bank be and is hereby approved, and that this commission will promptly comply with said provision, and will pay same at the earliest opportunity after the sale is consummated and said bonds are delivered to said bank, the said \$4,000 to be

paid from the rents and salvage from said Wenonah Park property."

The defendant bank offered to show upon the trial that the proposition from the bank referred to in the report of the ways and means committee was an oral proposition, and not the one contained in the letter from the bank of July 5th. The evidence was excluded and its rejection is assigned as error; but, even if received, it would not have been material. It is not shown that it ever came to the knowledge of the common council, and, whatever it was, the contract itself is contained in the report of the committee as adopted by the council, and its acceptance by the bank.

Before any of the bonds were delivered to the bank the following agreement, bearing date May 1, 1908, was signed by its president and the mayor of the city:

"Whereas, the two hundred thousand dollar bonds, commonly known as the Park bonds, have heretofore been sold to the Lumbermen's State Bank, and, whereas, said Lumbermen's State Bank has heretofore been designated as a depository of the proceeds derived from the sale of said bonds, they to indemnify the city in the sum of two hundred thousand dollars (\$200,000), it is hereby agreed and understood that said Lumbermen's State Bank is to immediately take such bonds and credit the city to the benefit of the park fund in the sum of two hundred thousand dollars, and to furnish the city with an indemnity bond in the sum of fifty thousand (\$50,000) dollars to be signed by some satisfactory surety company.

"Also that said bank shall give to the city a bond in the sum of one hundred and fifty thousand (\$150,000) dollars, to which shall be attached one hundred and fifty thousand dollars of the aforesaid park bonds as collateral security; both of said bonds to indemnify and save the city harmless from any loss on the deposit of said two hundred thousand (\$200,000) dollars in said Lumbermen's State Bank.

"That on the delivery of said indemnity bonds to the city treasurer he will deliver to said Lumbermen's

State Bank the aforesaid park bonds in the sum of two hundred thousand dollars and will receive from said bank a receipt for said two hundred thousand dollars together with the amount of interest now accrued on said bonds.

"It is further agreed and understood that upon application from the bank the city treasurer will deliver to it such portions of the one hundred fifty thousand (\$150,000) dollars of bonds held as collateral to any amount of same not exceeding the amount guaranteed by the said fifty thousand (\$50,000) dollars indemnity bond, or to such other amounts as a satisfactory indemnity bond shall be furnished by the said bank to the city treasurer.

"This memorandum of agreement made and entered into by and between the parties interested for and on behalf of the city and said bank, this first day of May, A. D. 1908."

The bank assumed control of the bonds and credited the Wenonah Park fund, on May 18, 1908, with their face value—\$200,000—and with the accrued interest thereon; and from that time the park commissioners drew against the fund as their necessities required. The park commissioners also deposited with the bank to the credit of the same fund the moneys received by them for rents from the park property, and from the sale of buildings thereon.

At some period, the exact date of which does not seem to be given, a further agreement was entered into between the bank and the city, the agreement being signed by the president of the bank and the mayor. This agreement begins with the following recital:

"Whereas, the city of Bay City has heretofore sold to and the Lumbermen's State Bank has heretofore purchased Bay City bonds in the amount of two hundred thousand dollars, which bonds were issued for the purpose of acquiring and constructing a public park; that on said sale of said bonds the said Lumbermen's State Bank gave to the city an indemnity bond in the sum of one hundred and fifty thousand dollars and a certificate of deposit issued by the People's State

Bank of Detroit in the sum of fifty thousand dollars, which said certificate and bond were given by said bank to said Bay City to indemnify said city against any loss by reason of said Lumbermen's State Bank then and there becoming and being the city depository for said two hundred thousand dollars—the proceeds received from the sale of said bonds”

—and then provides for a transfer and conveyance of \$50,000 of the bonds from the bank to the city, to be held in trust as security for the city deposits then in the bank.

On May 13, 1910, the commission of \$4,000 provided for by the report of the ways and means committee as adopted by the common council was paid to the bank out of the Wenonah Park fund. It was to recover back this payment that the present action was brought. The moneys credited to the fund for the bonds and the other things mentioned had practically all been drawn out by the park commission except enough to make the payment. The bank had on hand, at the time, about \$30,000, par value, of the bonds. The balance it had sold, from time to time, in small quantities. So far as the record shows the bonds so remaining are yet in the hands of the bank.

It is the theory of counsel for plaintiff that the transaction between the city and the bank constituted an absolute sale and purchase of the bonds at par, and that the payment of \$4,000, as a so-called commission, amounted in effect simply to a rebate or discount in violation of the statute. The trial court took this view of the matter and directed a verdict for plaintiff. The bank contends that it never purchased the bonds, but sold them for the city, and that the commission was compensation for its work which the city was authorized to pay.

To our minds the transaction was a sale and purchase of the bonds. The parties not only characterized it as such in express terms, but it possessed every

fundamental attribute of a sale and purchase. It was for a certain fixed price paid by the bank. The city thereafter had no interest in the selling value of the bonds. Had they appreciated in value the bank and not the city would have received the benefit. Had they depreciated the loss would not have fallen upon the city. It does not appear that the bank ever made any report of its sales to the city or that there was an accounting for the proceeds of the bonds it sold. In all of the papers executed after the bank had accepted the proposition contained in the report of the ways and means committee, the transaction was expressly recognized as a sale and purchase.

It is unnecessary to determine whether or not, under the limitations of the act, the city would have had power to pay a commission to an agent or broker for selling the bonds. If, as we have found to be true, the bank purchased the bonds outright, it was not an agent of, nor did it sell the bonds for, the city. It did not render the city any services for which it was entitled to a commission. The money paid to the bank amounted in substance and effect to a discount in violation of law, which required the bonds to be sold at par. *Village of Ft. Edward v. Fish*, 156 N. Y. 363 (50 N. E. 973); *Appeal of Whelen*, 108 Pa. 162 (1 Atl. 88). Further than this, the control of the "Wenonah Park fund" by the park commission was purely statutory, and it had no authority to make any payment therefrom to a purchaser, as such, of the bonds. Neither does the doctrine of estoppel apply, as contended for by the bank, inasmuch as the payment not only was unauthorized, but in violation of the express provisions of the statute.

The judgment is affirmed.

STONE, C. J., and KUHN, OSTRANDER, BIRD, MOORE, STEERE, and BROOKE, JJ., concurred.

HARMON v. PARKER.**1. MASTER AND SERVANT—CONTRACTS—EVIDENCE.**

In a suit for compensation for plaintiff's services as a carpenter, evidence that several checks used to pay him his salary were those of a corporation of which defendant was an officer was properly limited by the charge of the court to proof of payment, under the testimony of plaintiff, not contradicted, that the checks were received by his wife and that he had never seen them, nor did he know by whom they were drawn.

2. SAME—EVIDENCE—INTENT.

And at the trial, it was proper to exclude testimony in reply to the interrogatory of defendant whether he made the bargain in the capacity of an officer or as an individual; the fact should be established by the conversation of the parties and surrounding circumstances, not by the conclusion of the witness.

3. SAME—PRINCIPAL AND AGENT.

It is the duty of the agent, if he would avoid personal liability, to disclose his agency. Nor is it sufficient that the other party has the means of ascertaining the name of the principal. The agent must either bring home to him actual knowledge, or that which to a reasonable man is equivalent to knowledge, or the agent will be bound, and if he does not do so he may be held personally responsible upon the presumption that he so intended.

4. SAME—TRIAL—CONTRACTS, PARTIES TO—CORPORATIONS.

Where the issue was whether, in hiring the plaintiff as a carpenter, the defendant was dealing as an individual or as a corporate officer, and the attorney for defendant requested the court to charge that if, at the time, plaintiff knew defendant was acting in a representative capacity, only, and not in his individual capacity, there would be no necessity of disclosing the alleged agency, etc., the request, which was a correct statement of the law, and might very well have been granted by the court, was sufficiently covered by a general charge that if plaintiff had it in mind he was not hired by, or was not to

look to, defendant for his pay, the bargain was made with the corporation, and by further instructions of a general character and of similar tenor.

Error to Muskegon; Sullivan, J. Submitted June 13, 1916. (Docket No. 76.) Decided December 21, 1916.

Assumpsit in justice's court by Willis W. Harmon against Harrison M. Parker for work and labor performed. There was judgment for plaintiff and defendant appealed to the circuit court. Judgment for plaintiff. Defendant brings error. Affirmed.

Cross, Vanderwerp, Foote & Ross, for appellant.

Sutherland, Johnson & Sessions, for appellee.

PERSON, J. This is an action to recover a balance of \$116.91 due to plaintiff for his labor as a carpenter. It is admitted that he rendered the services charged for, and that he is entitled to receive the amount claimed. Nor is it denied that he was employed by defendant. The only ultimate issue at the trial was: Whether plaintiff was employed by defendant acting in his individual capacity, or by him as an officer and agent for a certain company known as "the Fruitvale Company."

The work for which plaintiff claims judgment was performed by him at Fruitvale, in this State, and there is evidence tending to show that it was actually performed for the company, but the contract of employment was made in Chicago, where plaintiff resides. The defendant is an officer of several companies, and transacts a large portion, at least, of his business in Chicago. The arrangement for plaintiff's employment was made at the office of the Fruitvale Company in the Hearst Building. Plaintiff requested defendant to give him work at Fruitvale, and the terms of the em-

ployment were agreed upon. This was towards the last of November, 1914, and plaintiff continued to work under the agreement from the 31st of that month to May 1, 1915. His work, in all, came to \$249.91, and he acknowledged various payments to the amount of \$133, leaving the aforesaid balance unpaid. This suit was begun in justice's court, where plaintiff recovered. Judgment was again given in his favor in the circuit court, and defendant brings the case here upon writ of error.

Defendant insists that in hiring plaintiff he was acting for the company, and that this was known to and understood by the plaintiff. It is not shown that the Fruitvale Company was expressly mentioned at the time of the employment, but, aside from the fact that the contract was made in the office of that company, evidence was given tending to prove that plaintiff had worked at Fruitvale in 1912 for the Fruitvale Land-Developing Company, of which defendant was an officer; that defendant at the time of the employment furnished plaintiff with report blanks headed "The Fruitvale Company"; that plaintiff was paid from time to time for his present services by checks of the Fruitvale Company or of the Fruitvale Transportation Company; and that he receipted for the last payment received, which was in money, by a receipt running to the Fruitvale Company. There was, perhaps, other evidence tending to show that his services were rendered for the Fruitvale Company. On the other hand, plaintiff testified that he supposed defendant owned personally a portion of the property at Fruitvale, and insists that the contract for services was made by him with the defendant as an individual, and not as officer of any company. The jury, as we have said, accepted plaintiff's theory of the hiring.

Defendant offered in evidence ten checks used in

making the payments to plaintiff. Nine of these were checks of the Fruitvale Transportation Company, and one was a check of the Fruitvale Company, and all were drawn to plaintiff's order. Plaintiff admitted that these were checks by which he had been paid, but testified that they were received by his wife in Chicago while he was at Fruitvale, and that he had never seen them before. His testimony was not contradicted, and, while the checks were received in evidence, the court limited their effect to proof of payment. In this defendant thinks the court erred, and that he should have been permitted to use the checks for the purpose of showing that the company had received the benefit of plaintiff's services, and that plaintiff was hired for and by the company. Inasmuch as plaintiff had never seen the checks and did not know by whom they were drawn, we think the court was right in the limitation imposed upon their use.

During the course of the trial the following question was asked defendant by his counsel:

"And when you made the bargain with him and you said, 'I will do so and so,' were you speaking as an individual or speaking as an officer of the company?"

The answer was excluded upon the theory that the fact inquired after should be shown by the conversation of the parties and surrounding circumstances, and not by any unexpressed intent of the witness. There was no error in this.

The rule governing situations like the one disclosed in this case is thus stated in *Mechem on Agency* (2d Ed.), § 1413:

"The duty rests upon the agent, if he would avoid personal liability, to disclose his agency, and not upon others to discover it. It is not, therefore, enough that the other party has the means of ascertaining

the name of the principal; the agent must either bring to him actual knowledge, or, what is the same thing, that which to a reasonable man is equivalent to knowledge or the agent will be bound. There is no hardship to the agent in this rule, as he always has it in his power to relieve himself from personal liability by fully disclosing his principal and contracting only in the latter's name. If he does not do this, it may well be presumed that he intended to make himself personally responsible."

The instructions given by the court to the jury were substantially in accord with the foregoing rule, and we do not think that the language used should be considered objectionable.

The court was requested by counsel for defendant to give the following instruction:

"If at the time the bargain was made the plaintiff already knew that Mr. Parker was acting in a representative capacity only, and not in his individual capacity, then there would be no necessity for Mr. Parker to make it known to Mr. Harmon that he (Mr. Parker) was acting as the representative of the Fruitvale Company."

This request was a correct statement of the law, and might well have been given by the court. But we think the same idea was fairly expressed in the general charge where the court said:

"If Mr. Harmon, the plaintiff, had it in his mind that he was not hired, and was not to look to Mr. Parker for his pay, then, of course, the bargain * * * would rather have been made with the Fruitvale Company."

And again:

"I said to you before, and I repeat it again, that a man is an individual before he is the president of a company, and the law intends that people dealing with each other, rather deal with each other as individuals, unless there is something in the surrounding facts and

circumstances that would lead a jury of 12 men to believe that—fairly believe that it was not so intended.”

On the whole we do not believe that any such error has been pointed out in the proceedings as should cause a reversal, and the judgment is affirmed.

STONE, C. J., and KUHN, OSTRANDER, BIRD, MOORE, STEERE, and BROOKE, JJ., concurred.

CHYLOWSKI *v.* STEINBERG.

1. FORCIBLE ENTRY AND DETAINER—LANDLORD AND TENANT—SUMMARY PROCEEDINGS—CIRCUIT COURT COMMISSIONER—FORCE—ACTIONS, CONDITION FOR.

A complaint before a circuit court commissioner, which does not state that the defendant entered into the premises with force or that he unlawfully holds them by force, as required by 3 Comp. Laws 1915, § 13231, is not a complaint for forcible entry or detainer, and does not cover the case of a landlord who retains possession of his premises against the right and demand of his tenant.

2. SAME—FORCE—POSSESSORY ACTION.

There must be evidence, to support the proceeding, that the entry or detainer was riotous, or personal violence must be used or in some way threatened, or the conduct of the parties guilty of the entry or detainer must be such as in some way to inspire terror or alarm in the persons evicted or kept out; in other words, the force is not against or upon the property, but force used or threatened against persons as a means, or for the purpose of, evicting or keeping out the possessor.

3. SAME — CIRCUIT COURT COMMISSIONER — JURISDICTION — EJECTMENT.

Summary proceedings, under the provisions of 3 Comp. Laws 1915, § 11164 *et seq.*, cannot be brought for the possession of premises by a lessee against the landlord, who refuses to give or restore possession. Plaintiff's remedy is damages or ejectment.

Error to Wayne; Mandell, J. Submitted July 21, 1916. (Docket No. 149.) Decided December 21, 1916.

Summary proceedings by Alexander Chylowski against Louis Steinberg for the possession of leased premises before a circuit court commissioner of Wayne county. Defendant removed the cause by appeal to the circuit court. Judgment for plaintiff. Defendant brings error. Reversed, and no new trial ordered.

Louis James Rosenberg (*Cornelius & Ring*, of counsel), for appellant.

William H. Turner, for appellee.

STONE, C. J. This proceeding was instituted by the plaintiff to obtain possession of one room contained in a building known as 1008 Michigan avenue, Detroit. The defendant was the owner of a two-story building located on said avenue. It consisted of two stores on the ground floor, and two separate living apartments on the second floor. On May 1, 1912, plaintiff, under a verbal arrangement with defendant, moved into and took possession of one of the stores, being No. 1008, and the living apartment above. He was to use the store for business purposes, and as at the time of renting the premises he had no personal use for the living apartment, he rented it to a tenant by the name of Walters. During the month of May the defendant was altering and repairing the upper story of the building. The living apartment, up to that time, was

divided into three large rooms. It was changed by defendant into seven smaller ones. Plaintiff's tenant, Walters, moved in on May 1, 1912, during the time the alterations were being made. Not having sufficient room to house his family during the time the repairs and alterations were being made, Walters asked the defendant for the privilege of using the small room that is the disputed subject of this suit. Defendant permitted him to use the room during the time the repairs were being made. The repairs were completed on May 26, 1912, and Walters surrendered the possession of this room to the defendant.

The plaintiff desiring a written lease, the parties entered into an agreement whereby plaintiff leased from defendant the premises known as 1008 Michigan avenue for a period of five years from June 1, 1912. Plaintiff has never had possession of the disputed room, by tenant or otherwise, since June 1, 1912, and it is the claim of defendant that plaintiff has never had possession of the room under the written lease of that date. It appears that the sole occupancy of this room by plaintiff was by his said tenant during the month of May, while the repairs and alterations were being made. Matters ran along until December 13, 1913, when plaintiff demanded possession of the room. This demand not being complied with, this suit was instituted by the plaintiff on January 22, 1914, upon the following complaint:

"STATE OF MICHIGAN,
COUNTY OF WAYNE, ss..

"To SAMUEL L. MAY,

"Circuit Court Commissioner of Wayne County,
"Michigan:

"The complaint of Alexander V. Chylowski, of said county of Wayne, respectfully shows that Louis Steinberg is in possession of the following described lands and tenements situated in the city of Detroit, said county and State, to wit: 'Rooms at No. 1008 Michi-

gan avenue.' That complainant is the lessee of said premises, and that Leonard L. Szmanski is his agent, and makes this complaint for and in his behalf. That defendant both holds said premises unlawfully and against the rights of said complainant, and that said complainant is entitled to possession of same. Wherefore this complainant prays that proceedings according to the statute in such case made and provided, may be taken against said defendant and that the possession of said premises may be restored to said complainant.

LEONARD L. SZMANSKI."

This complaint was duly sworn to and filed with the circuit court commissioner, and a summons was duly issued and served. Defendant duly appeared and pleaded not guilty. Upon the trial before the commissioner a judgment of restitution was duly entered, and defendant appealed to the circuit court where a jury trial was had.

At the trial in the circuit court, at the close of plaintiff's case, and also at the close of all of the testimony, the defendant moved for a directed verdict in his behalf upon the grounds that plaintiff had mistaken his remedy, that in place of summary proceedings, he should have proceeded in an action for damages, or in ejectment; also that it appeared from plaintiff's own testimony that defendant had always contended that this part of the premises was not covered by the lease, and that plaintiff had never obtained possession thereunder. The motion was denied and exception duly taken, and the case was submitted to the jury.

The trial resulted in a verdict and judgment for the plaintiff, and the defendant has brought the case here upon writ of error. Among the assignments of error are the following:

(1) "The court erred in refusing to direct a verdict of 'no cause for action,' upon the motion in that behalf

made, for the reason that said plaintiff never had possession under the lease, and had therefore chosen the wrong remedy to obtain possession thereof."

(4) "The court erred in making the following statement to the jury in his charge: 'Now the plaintiff claims that he was in possession before this lease was made; he claims that after the lease was made, his possession was the same. Now, as he went lawfully into possession on the 1st of May of the premises known as 1008 Michigan avenue, he could not be deprived of such possession except in a lawful manner, and his complaint is that he was deprived by the defendant taking possession, either surreptitiously or by force, of this particular room.'"

The above is a correct excerpt from the charge, and the trial court also instructed the jury that the proceedings were brought under the first ten sections of chapter 308, 3 Comp. Laws, §§ 11153-11162 (3 Comp. Laws 1915, §§ 13229-13238), and that the claim of defendant that the proceedings were under section 11164 *et seq.* was not true.

The record is in a very unsatisfactory condition. The written lease of June 1, 1912, although offered in evidence, does not appear in the record. It does appear, however, that it was made and took effect June 1, 1912, and had no relation to May 1st. It seems to us that the case was tried under a misconception, which amounted to a mistrial.

Neither the complaint nor the evidence warranted the court in holding that the case was brought under the first ten sections of chapter 308 of the Compiled Laws. Under those sections the complaint must state, among other things, that defendant "entered into the same with force, or that he unlawfully holds the same by force." Section 11155. See notes to these sections in 5 How. Stat. (2d Ed.) chap. 366. For proper form of complaint under that part of said chapter, see *Bush v. Dunham*, 4 Mich. 345; *Carpenter v. Harris*, 51 Mich.

223 (16 N. W. 383) ; *Kusterer v. Wise*, 59 Mich. 382 (26 N. W. 645).

The first ten sections of this chapter provide for the recovery of possession of land which has been entered or detained by force. *Shaw v. Hoffman*, 25 Mich. 162-169; *Marsh v. Bristol*, 65 Mich. 378-386 (32 N. W. 645) ; *Davis v. Ingersoll*, 2 Doug. 372.

In *Shaw v. Hoffman*, *supra*, Chief Justice CHRISTIANCY said:

"But the entry or the detainer must be riotous, or personal violence must be used or in some way threatened, or the conduct of the parties guilty of the entry or detainer must be such as in some way to inspire terror or alarm in the persons evicted or kept out—in other words, the force contemplated by the statute is not merely the force used against, or upon, the property, but force used or threatened against persons, as a means, or for the purpose, of expelling or keeping out the prior possessor."

As we have already said, there was no evidence of any force or intimidation whatever; hence the action cannot be based on the first ten sections of the chapter referred to.

The undisputed evidence in the case, upon this record, shows that plaintiff was never in possession of the disputed room under the lease of June 1, 1912.

If it were argued that the suit was brought under sections 11164 to 11166, 3 Comp. Laws (3 Comp. Laws 1915, §§ 13240-13242), and that the holding of the court otherwise was harmless error, our reply is that under the authority of *Freeborn v. La Londe*, 118 Mich. 662 (77 N. W. 269), summary proceedings under said last-named sections cannot be brought by a lessee against the landlord who refuses possession.

The statute is not applicable in such a case, and the remedy of the plaintiff must be either by an action for damages or ejectment. 24 Cyc. p. 1051.

We are of opinion that the plaintiff has mistaken his remedy, that the court should have granted said motion for a verdict for defendant, and that the judgment below should be reversed, with costs to defendant, and that no new trial should be granted.

KUHN, OSTRANDER, BIRD, MOORE, STEERE, BROOKE, and PERSON, JJ., concurred.

WEADOCK v. CHAMPE.

1. VENDOR AND PURCHASER—OPTIONS—CONTRACTS—DESCRIPTION.

A description of a block of store buildings in a written contract, or option, as the "Eagle Block" carried with it the buildings and rights of support of the adjoining block, in the form of a party wall, existing as such when the owner granted the option.

2. SAME—DEED—LEASE—ACCEPTANCE.

Acceptance of the terms of the option required an unconditioned assent to its terms, and a letter suggesting a change in the description, and enclosing a deed describing the property by dimensions, etc., so as to extend beyond the center line of the wall, and not including a party wall agreement proposed by the defendant, was a counter proposition and did not create a contract, where the deed included about seven inches of the adjoining store block, instead of establishing the dividing line in the center of the party wall.

3. SAME—OFFER AND ACCEPTANCE.

Held, also, that by providing in the acceptance that the conveyance should be subject to all existing party wall agreements of record in the registry office on the date thereof, the vendee in the option excluded certain existing party wall rights that were not of record and that defendant was relieved from the effect of an acceptance and was justified in refusing the counter proposal.

4. SAME—PARTY WALLS—LEASES—OPTION.

Where plaintiff, after securing the option, examined the leases existing upon the property, and, having retained them for some time, expressed himself as satisfied, a deed, executed by defendant subject to the outstanding leases, was not objectionable, though the leases were not recorded in the office of register of deeds.

5. LIMITATION OF ACTIONS—PARTY WALL—RECORD.

And where a division wall between two buildings was used for the period of the statute of limitations it became a party wall, without any recorded agreement.

Error to Saginaw; Gage, J. Submitted June 26, 1916. (Docket No. 72.) Decided December 21, 1916.

Assumpsit by G. Leo Weadock against Elizabeth Champe for breach of contract for the sale of real estate. Judgment for plaintiff. Defendant brings error. Reversed, and no new trial ordered.

H. E. Spalding, for appellant.

Miles J. Purcell (Humphrey, Grant & Humphrey,
and *George W. Weadock*, of counsel), for appellee.

STONE, C. J. This is an action in assumpsit to recover damages for the breach of a contract alleged to have been made by the defendant to sell and convey certain premises to the plaintiff. The case was tried by the court without a jury, and resulted in a judgment for the plaintiff of \$6,000.

At the time of the alleged contract, the defendant owned certain premises in lots 7 and 8 of block 34 of Hoyt's subdivision in the city of Saginaw, situate on the south side of Genesee avenue between Washington avenue and Franklin street. On it were situate two brick blocks, the westerly one Nos. 214 and 216 Genesee avenue, known as the "Eagle Block," the other known as the "Tea Store" property, and numbered

218, adjoining the Eagle Block on the east. Both these blocks had been built before 1870, and, with the exception of certain alterations in their fronts, had remained unchanged. Between the two blocks was a single brick wall 12 inches thick, which wall supported the joists of both buildings, and served as a party wall for the benefit of both. The easterly side line of this wall was some 47.7 feet west of the easterly side line of lots 7 and 8, and west of Franklin street upon which both lots (lot 8 lying south of lot 7, and forming the rear part of the premises in question) abutted.

On February 2, 1907, the defendant, at plaintiff's request, executed the following option, drawn by the plaintiff, but running to his brother:

"This contract, made this 2d day of February, A. D. 1907, by and between Elizabeth Champe of Saginaw, Michigan, party of the first part, and John V. Weadock of the same place, party of the second part, witnesseth:

"The said party of the first part, in consideration of the sum of one dollar and other valuable consideration to her in hand paid by the said party of the second part, does hereby agree that she shall and will at any time on or before April 1, 1907, from the date hereof, at the written request of the said party of the second part, execute and deliver to him, or to any person or persons as he, the said party of the second part shall direct in writing, a good and sufficient warranty deed of the following described land, situated in the city of Saginaw, county of Saginaw, State of Michigan, to wit:

"The property known as the Eagle Block situate on the south side of the Genesee avenue between Franklin street and South Washington avenue in the city of Saginaw, Michigan, for the sum of twenty-four thousand (\$24,000) dollars, payable as follows: Cash on delivery of warranty deed, abstract and tax history.

"And the said party of the first part does hereby further agree that she shall and will not before April 1, 1907, from the date hereof, sell, convey, mortgage or otherwise encumber the said land, or any part

thereof, or do, or permit to be done, any act or deed to diminish or encumber the title to said land.

"It is agreed by and between the parties hereto, that if the said party of the second part at the expiration of the aforesaid limited time shall have declined or omitted to make application for the purchase of said land at the price aforesaid then this instrument shall be void, and the above sum of one dollar so paid as aforesaid shall be forfeited by the said party of the second part, and the said party of the first part shall have the right to retain the same as and for liquidated damages, and the said party of the second part shall relinquish to said party of the first part all claim to the said land, either in law or equity, and also all claim to the said sum of one dollar, so paid as aforesaid, and no claim of the said party of the second part under this contract shall then be effectual.

"In witness whereof, the said party has hereunto set her hand and seal the day and year first above written.

"ELIZABETH CHAMPE. [Seal.]

"In presence of:

"G. LEO WEADOCK.

"GEO. W. WEADOCK.

"STATE OF MICHIGAN, }
"COUNTY OF SAGINAW, } ss.:

"On this 2d day of February, A. D. 1907, before me, the subscriber, a notary public in and for said county, personally appeared Elizabeth Champe to me known to be the same person described in and who executed the foregoing instrument, as vendor, and acknowledged the same to be her free act and deed.

"G. LEO WEADOCK,

"Notary Public in and for Saginaw County, Mich.

"My Commission expires 3/5/1910."

Shortly after the execution of the option, the defendant, who lived at the Hotel Vincent in Saginaw, went to Washington, D. C., on a visit, returning April 3, 1907. During her absence, and on March 27th, the plaintiff sent to her at her Saginaw address the following letter:

"SAGINAW, MICH., March 27, 1907.

"MISS ELIZABETH CHAMPE,

"c/o Hotel Vincent,

"Saginaw, Michigan.

"*Dear Madam:* In re Eagle Block. In pursuance to your option to Mr. John V. Weadock dated February 2, 1907, now held by me, I hereby request you to execute and deliver to the People's Savings Bank of the city of Saginaw, Michigan, a good and sufficient warranty deed to G. Leo Weadock of the following described land, viz.: East twenty-one and a half ($21\frac{1}{2}$) feet of the west fifty-one and a half ($51\frac{1}{2}$) feet of lot seven (7), and the east twenty-one and a half ($21\frac{1}{2}$) feet of the west fifty-one and one-half ($51\frac{1}{2}$) feet of north half of lot eight (8), also west twenty-one and a half ($21\frac{1}{2}$) feet of east sixty-eight and a half ($68\frac{1}{2}$) feet of lot seven (7), and the west twenty-one and a half ($21\frac{1}{2}$) feet of east sixty-eight and a half ($68\frac{1}{2}$) feet of north half of lot eight (8) in block thirty-four (34) of Hoyt's plat of the city of East Saginaw, now a part of the city of Saginaw, Michigan, according to the recorded plat thereof. It being the intention of said first party to hereby convey all of the property known as the 'Eagle Block' situate on the south side of Genesee avenue between Washington avenue and Franklin street and being known as Nos. 214 and 216 Genesee avenue in the city of Saginaw, Michigan, subject to all existing party wall agreements as of record in the office of the register of deeds of Saginaw county, Michigan, on the 2d day of February, 1907. So that I may pay the purchase price, viz. \$24,000, to you at said bank on or before April 1, 1907. To save you trouble in the premises, I herewith hand you a deed in pursuance to your option which you may submit to your attorney and if you find it satisfactory, execute and deliver on or before April 1, 1907.

"Very truly yours,

"G. LEO WEADOCK."

On the same day, he sent to her Washington address the following letter, inclosing therein a copy of the Saginaw letter:

"SAGINAW, MICH., March 27, 1907.

"MISS ELIZABETH CHAMPE,

"c/o Riggs House,

"Washington, D. C.

"*Dear Madam:* I herewith inclose you copy of a letter sent forward to your Saginaw address by registered mail today. I am also inclosing you a deed, a duplicate of that sent to Saginaw.

"We have carefully compared the description in this deed with that in the deed to you covering the same property and would suggest that you execute same before some notary or other person authorized to take acknowledgments in the District of Columbia, or wherever this letter may reach you, and forward to the People's Savings Bank of this city, with instructions to them not to deliver to me except upon receipt of \$24,000 and then give such instructions as you may want in regard to \$24,000, which I will pay you for this property. This is the clean way of doing it and the most convenient for you.

"Please give this matter your immediate attention, as I desire to get possession of this property before the first of the month. At any rate, I claim rent from the first of April.

"Trusting that you are well and enjoying your eastern trip, I remain

"Very truly yours,

"G. LEO WEADOCK."

Each letter contained a draft of deed, the description of which was identical with that recited in the letter sent to defendant, care of the Hotel Vincent. These letters constitute the only written acceptance claimed to have been made of defendant's offer to sell and convey the Eagle Block. No other written request or demand for conveyance than that contained in these two letters of plaintiff was ever made upon the defendant. John V. Weadock, to whom the option ran, neither in writing nor otherwise, ever requested her to execute a deed, either to himself or to any one else. John V. Weadock did, on March 30th, make a written assignment of the option to the plaintiff, but defend-

ant was not notified of this assignment. These letters sent by the plaintiff to the defendant were received by her on April 3d, on her return to Saginaw. She inquired at the bank to ascertain if the \$24,000 was there for her, and was told it was not. She, however, directed her attorney to prepare a deed to the plaintiff, for conveyance of the Eagle Block, and a deed was accordingly prepared, executed, and tendered to the plaintiff on April 10, 1907. The description in that deed was as follows:

"All that part of lots seven (7) and eight (8) in block thirty-four (34) of Hoyt's plat of the city of East Saginaw, Michigan, described as follows: Commencing at a point on said lot seven (7) on Genesee street, one hundred and fifty (150) feet east from the northwest corner of lot 6 in said block 34 and on the line of premises heretofore deeded by Cornelia A. Young to Daniel S. Hall, thence south on a line parallel with Washington street, ninety (90) feet, thence east on a line parallel with Genesee street, twenty-one and one-half ($21\frac{1}{2}$) feet, thence north on a line with Washington street, ninety (90) feet to Genesee street, thence west along the south boundary line of Genesee street twenty-one and one-half ($21\frac{1}{2}$) feet to the place of beginning, being also described as the east twenty-one and one-half feet of the west fifty-one and one-half ($51\frac{1}{2}$) feet of lot seven (7) and the east twenty-one and one-half ($21\frac{1}{2}$) feet of the west fifty-one and one-half ($51\frac{1}{2}$) feet of the north half of lot eight (8) in said block, and subject to the joint use of the party wall on the westerly line of said described property, which party wall may be used in common with the owner of the adjoining premises; also all that part of lots seven (7) and eight (8) in block thirty-four (34) of Hoyt's plat of the city of East Saginaw bounded and described as follows:

"Commencing at a point one hundred and seventy-one and one-half ($171\frac{1}{2}$) feet distant on the south line of Genesee avenue, from the northwest corner of lot six (6) in said block, running thence southerly on a line parallel with Washington avenue, ninety (90) feet, thence easterly on a line parallel with Genesee

avenue, twenty-one and one-half ($21\frac{1}{2}$) feet, thence northerly on a line parallel with Washington avenue to the south line of Genesee avenue, thence westerly on the south line of Genesee avenue twenty-one and one-half ($21\frac{1}{2}$) feet to the place of beginning, being also described as the west twenty-one and one-half ($21\frac{1}{2}$) feet of the east sixty-eight and one-half ($68\frac{1}{2}$) feet of lot seven (7) and the west twenty-one and one-half ($21\frac{1}{2}$) feet of the east sixty-eight and one-half ($68\frac{1}{2}$) feet of the north half of lot eight (8) in said block thirty-four (34), and subject to the joint use of the party wall on the easterly line of said described property, which party wall is to be used in common by the parties hereto, and the center line of said party wall being the division line between the properties deeded to second party and the property still owned by the first party and occupied by the Grand Union Tea Company.

"It is the intention of the first party to hereby convey all the property known as the Eagle Block, so called, and all rights and appurtenances acquired by user, adverse possession or written instruments relating thereto, and being Nos. 214 and 216 Genesee avenue, in the city of Saginaw, Michigan.

"This conveyance is also made subject to the leases given by first party to A. J. Schirmer dated April 1, 1906, and the firm of Oppenheim & Levy, dated April 1, 1916, and W. C. McKinney, dated April 1, 1906, and the occupation of the office on second floor over No. 214 Genesee avenue by Dr. O. P. Barber."

The effect of this deed was to make the easterly line of the property conveyed, being the division line between it and the Tea Store property retained by the defendant, the center line of the wall lying between the Eagle Block and the Tea Store, and to declare that wall a party wall, as it had always been in fact. The plaintiff refused to accept the deed, as he testified, for the following reasons: That it established a party wall agreement in the easterly line of the building, whereas at the time of the option there was no party wall agreement of record, and he knew nothing about

it; that it established a dividing line between the two properties; and that the deed did not set forth the terms of the leases which it mentioned, nor were these leases of record, nor was the option subject to any lease. It was undisputed that an abstract and tax history had been given the plaintiff some time in February, and the leases referred to in the last-named deed had also been submitted him some time in March. Although the plaintiff claimed that the option was not subject to any lease, his letter of March 27th, in which he expressed a desire to get possession before April 1st, and claiming rent from that date, indicates that he expected to take the property, with which he was well acquainted, subject to the outstanding leases. After this refusal, and on April 12th, the defendant declared the deal off, and on April 20th she sold and conveyed the property for \$24,000 to another person, using the same description contained in the deed which the defendant had tendered the plaintiff on April 10th. The instant suit was thereupon brought.

The foregoing facts are substantially covered by the court's findings, except the fact that the easterly line of the description given in the plaintiff's letter of acceptance, and for which he demanded a deed, is at least seven-tenths of a foot east of the easterly line of the wall between the Eagle Block and the Tea Store, and is within the Tea Store property, and the fact that both buildings were built before 1870, and had remained substantially unchanged, and that the wall between them gave support to both and was used as a party wall, and the fact that John V. Weadock never requested a deed. The court made no findings on either of these points, though duly requested by the defendant's proposed amendments so to do. The case has been brought here by the defendant upon a writ of error.

The exceptions to findings made, and to disallowance of amendments proposed, and the assignments of error thereon, are numerous; but we shall pass some of them and consider the following questions:

(1) Whether there was a valid acceptance of the option.

(2) Assuming that there was a valid acceptance, was the plaintiff warranted in refusing to accept the deed tendered by defendant?

1. It is the claim of defendant that there was no valid acceptance of the option, because plaintiff's letter of acceptance demanded more land than the option covered; and that this was an attempted modification of the defendant's offer, and not the unconditional acceptance necessary to turn that offer into a binding contract. It clearly appears that by the terms of the option the defendant agreed to sell the "Eagle Block." According to the undisputed testimony, both that block and the Tea Store adjoining it upon the east were built before 1870, and except for changes in the fronts, immaterial here, remained in their original condition. They were separated by a 12-inch wall, into which the joists of both entered, and which had always been used as a party wall by both. The plaintiff, who drew the option, was familiar with the property. The ownership of the blocks was originally separate, but had become united in 1897, and the defendant owned them both. We think that, in view of these facts, it cannot be doubted that the "Eagle Block," called for by the option, meant the building and land on which it stood, together with party wall rights in the division wall between it and the Tea Store property. *Tuthill v. Katz*, 163 Mich. 618 (128 N. W. 757). The plaintiff therefore was required, in order to convert the option into a contract, to accept that option in writing and according to its terms. He might, properly, demand a conveyance of the Eagle Block, described in accordance

with the legal meaning of that term, as above indicated. What he did do in his letter of acceptance was to state that, in pursuance to the option, he requested a deed to himself of a description calling for the west $21\frac{1}{2}$ feet of the east $68\frac{1}{2}$ feet of lot 7, and of the north half of lot 8, which made the easterly boundary of the parcel demanded a line 47 feet west of the easterly boundary of lot 7. By the uncontradicted testimony of the surveyors, both for plaintiff and defendant, the easterly edge of the wall between the Eagle Block and the Tea Store is more than 47.7 feet distant from the easterly line of lot 7. The plaintiff's "acceptance," therefore, was a demand of a conveyance covering, not only the entire division wall, but a strip $\frac{7}{10}$ of a foot wide east of that wall, and inside the Tea Store.

Furthermore, by the proviso that the conveyance was to be subject to all existing party wall agreements, *as of record in the office of the register of deeds on February 2, 1907*, he excluded all party wall rights for which there was no agreement of record. There was such an agreement of record as to the wall between the Eagle Block and the property west of it; but there was no such agreement regarding the wall in question between the Eagle Block and the Tea Store. The defendant had offered to sell one thing, the Eagle Block. The plaintiff offered to accept another thing, to wit, a parcel of land including the Eagle Block, the entire division wall, and a strip of land $\frac{7}{10}$ of a foot wide east of that wall. This was not an acceptance, but a counter proposal, which defendant properly rejected by refusing to sign any deed which embodied it. We do not think there had been any such merging of the title of the two properties as extinguished any party wall easement theretofore existing. Even had the two buildings been erected by the defendant as owner, the

sale of one of them as a block or building would pass the title, subject to the right of that retained, to the use of the wall between them as a party wall. *Hendricks v. Stark*, 37 N. Y. 106 (93 Am. Dec. 549); *Schaefer v. Blumenthal*, 169 N. Y. 221 (62 N. E. 175); *Ingalls v. Plamondon*, 75 Ill. 118. From the testimony of the plaintiff it appears that he claimed the whole of the east wall of the Eagle Block.

2. It is the further claim of defendant that, assuming that there was a valid acceptance, plaintiff was not justified in refusing the deed tendered by defendant, and that such refusal relieved the defendant of any farther liability.

Was the provision in the deed tendered, making the conveyances subject to existing tenancies, proper?

As already stated, the leases were delivered to the plaintiff in March for examination, and were retained by him some time, and he expressed himself as satisfied with them. We have referred to his letter which spoke of rent from April 1st. The fact that the leases were not of record is not important, as he knew their terms. We do not think that the provision rendered the deed objectionable.

Was the plaintiff entitled to object to the party wall agreement contained in this deed?

"Every wall of separation between two buildings is presumed to be a common or party wall if the contrary be not shown, and this not only is a rule of positive ordinance, but is a principle of ancient law." Washburn's Easements and Servitudes (4th Ed.), p. *458; *Hendricks v. Stark*, *supra*; and other cases cited above.

We think the law is well settled that, where a division wall between two buildings has for a period larger than that of the statute of limitations been used for the support of both buildings, it becomes in effect a party wall, whether it was originally constructed as

such or not, and without any express agreement between the owners of the buildings, and that one who purchases such a building takes it subject to such party wall right. Such was the case with the east wall of the Eagle Block.

As above stated, this wall supports both the Eagle Block and the Tea Store buildings, and both buildings have been standing for upwards of 40 years, and there was no evidence of any change in the use of this wall. The necessary inference is that its use as a party wall has been continuous during that period. If no mention at all had been made in the deed respecting the use of this wall as a party wall, the plaintiff would have taken title subject to the joint use of this wall as such by the two buildings. The party wall agreement mentioned in the deed, therefore, did nothing more than to state the rights of the parties respecting this wall that would have been implied without such provision in the deed. The plaintiff was familiar with the property. He had appraised it as one of the appraisers in the matter of the estate of Michael Jeffers, deceased. He also testified that he knew definitely the location of the block, and that he informed the defendant that no further description than the words "Eagle Block" in the option was necessary. The description in the deed tendered, fixing the center line of the east wall as the easterly boundary of the premises, was proper and gave the plaintiff all that he was entitled to, under the option.

Another matter appearing in the record should be referred to. The estate of Michael Jeffers, deceased, owned both the Eagle Block and the Tea Store property. It was assigned in the administration of the estate to the defendant and John Jeffers in equal portions. The two heirs, in 1906, adjusted their interests by a partition deed, and in that deed, as shown by the

memorandum in the record, for the first time in the chain of title, occurs the description which the plaintiff claims he was entitled to under the option. That description is given in that deed only as an alternative to the description already referred to of the 43-foot parcel, commencing on a line 150 feet east of the northwest corner of lot 6, being the description in the deeds under which Michael Jeffers derived his title. As has been already shown, that alternative description is in fact erroneous, as a description of the Eagle Block, because calling, not only for the entire division wall, but for a strip of land to the east of that wall, and in the Tea Store.

The fact should not be lost sight of that all the plaintiff claimed was the Eagle Block. "The Eagle Block" may be said to be the "master description," or the controlling description, in the option; and there is no claim that this description was a mistake. We held, in *Tuthill v. Katz*, *supra*, that such a description was sufficient; and, although the instrument itself contained also an erroneous description, the mistaken portion of the deed must be rejected, and the remainder be treated as controlling. Here, the instrument itself contained no erroneous description, and an erroneous alternative description in the partition deed cannot avail plaintiff under his option for the purchase of the Eagle Block.

So in any view which we are able to take of the case under the undisputed evidence, we think the trial court erred in not entering judgment for the defendant.

For the reasons given, the judgment below is reversed, without a new trial.

KUHN, OSTRANDER, BIRD, MOORE, STEERE, BROOKE, and PERSON, JJ., concurred.

LONG POINT DEVELOPMENT ASS'N v. MCINTOSH.

1. INJUNCTION—RESTRAINING ACTION AT LAW—ADEQUATE REMEDY AT LAW.

Where plaintiff filed a bill to enjoin defendants from maintaining a garnishment suit upon certain contracts for broker's commissions for selling lands, representing that there existed an oral arrangement between them and their agents, including plaintiff, that they would set off their commissions against certain sums due to the company upon land contracts, and complainant prayed for an injunction and for an accounting under the contracts, the bill was not multifarious, and presented a case for equitable cognizance.

2. SAME—JUDICATURE ACT—STATUTES—REPEAL—COURTS.

The exception to Act No. 283, Pub. Acts 1915, relating to injunctions staying proceedings in State or Federal courts, and limiting authority to issue the same to a judge having the same territorial jurisdiction, is repealed by the judicature act. 3 Comp. Laws 1915, § 12004 *et seq.* The general repealing clause, referring to acts inconsistent therewith, repealed the pre-existing statute, since the last clause, omitted in the judicature act, was not consistent with the new statute.

Appeal from Cheboygan; Shepherd, J. Submitted June 12, 1916. (Docket No. 33.) Decided December 21, 1916.

Bill by the Long Point Development Association against John S. McIntosh and Paul D. Wampler, co-partners as McIntosh & Wampler, for an injunction against an action at law and for other relief. Defendants filed a motion to dismiss the bill. From an order denying the motion, defendants appeal. Affirmed.

Victor D. Sprague, for complainant.

Coumans & Gaffney, for defendants.

KUHN, J. This is an appeal from the order of the trial court denying a motion to dismiss the bill of complaint filed in the cause on the ground that it is multifarious and that the plaintiff has an adequate remedy at law.

The averments of the bill set up, in substance: That the defendants, as copartners, have a written contract with the plaintiff to act as its selling agents of certain tracts of orchard land, on which contract there was due and unpaid on October 1, 1915, approximately \$1,500 of earned commissions. That the defendants, individually, have certain contracts with the plaintiff for the purchase of certain orchard tracts from it, upon which contracts moneys fall due on December 18th of each year. That there was a verbal understanding, and by long practice it has been the custom of the parties, to set off against the commissions owed by plaintiff to the defendants the sums due plaintiff from the defendants on those contracts. That on October 1, 1915, the defendants commenced suit against the plaintiff in the circuit court for Bay county claiming that there was due from plaintiff to the defendants the sum of \$2,000 over and above all legal set-offs, and began garnishment proceedings against 14 persons who were indebted to the plaintiff; and it appeared that the plaintiff herein has not been served or appeared as defendant in that suit. That on December 1, 1915, a suit was begun in the circuit court for the county of Cheboygan by one Stephen D. Corvin as plaintiff against McIntosh & Wampler, defendants herein, as defendants, in which suit it was claimed that there was due him from the defendants the sum of \$1,075, and the plaintiff in this suit was made garnishee defendant therein.

On January 1, 1916, the bill of complaint in this cause was filed alleging the above facts and the claim that the suit in Bay county was maliciously instituted by the plaintiff therein for the purpose of embarrassing and harassing the plaintiff in the sale of its orchard lands. The bill prayed for the following relief:

(a) Injunctive relief against McIntosh & Wampler from prosecuting their suit instituted in Bay county.

(b) Injunctive relief against the garnishee proceedings in the same court, and that the defendants therein be ordered to pay over any money due from them to plaintiff.

(c) An accounting between plaintiff and defendants, as individuals and copartners, praying an application of the moneys according to the equity set up in the bill.

(d) Injunctive relief against Corvin prosecuting his garnishment suit in the Cheboygan county court against complainant, and that the moneys garnished by Corvin be released from garnishment and applied as directed in the accounting.

Appellants seek to review here the refusal of the lower court to dismiss the bill for the two reasons stated above.

We do not think that it can be said that the bill in question is multifarious under the authority of the following cases: *Torrent v. Hamilton*, 95 Mich. 159 (54 N. W. 634); *Densmore v. Savage*, 110 Mich. 27 (67 N. W. 1103); *Cleland v. Casgrain*, 92 Mich. 139 (52 N. W. 460). See, also, Puterbaugh's Michigan Chancery, pp. 22-24.

In *Torrent v. Hamilton*, *supra*, in discussing the question of multifariousness, this court quoted the following from 1 Daniell, Ch. Pl. & Pr. p. 335:

"What is more familiarly understood by the term 'multifariousness,' as applied to a bill, is where a party is able to say he is brought as a defendant upon a record, with a large portion of which and of the case made by which he has no connection whatever."

Can it be said that the appealing defendants here are brought in "upon a record a large portion of which and of the case made by which he has no connection"? We think not, for they are certainly interested in the commission-selling contract; they are interested in the moneys due thereunder and the suit they brought to recover the same; they are interested in the orchard contracts and the moneys due thereunder; and they are interested in the suit brought against them by Mr. Corvin and in the garnishment of the moneys claimed to be due them from the plaintiff.

It is the plaintiff's claim that the object of the bill is to protect the plaintiff's rights which are centered in \$1,500 of selling commissions. The plaintiff claims that money to apply on the orchard contracts. The appealing defendants claim the money, and the defendant Corvin claims the money, and the only object of the bill seems to be the determination of its disposition. Counsel for plaintiff do not contend that they are seeking to compel Corvin and McIntosh & Wampler to litigate their demands in this suit, and no interference with that suit is sought, although such a suggestion is made in the bill; it being now stated that it was intended only as a suggestion.

With reference to the claim that the plaintiff has an adequate remedy at law, it is the plaintiff's contention that the oral agreement or verbal understanding as to the settlement to be made each year was not a legal contract enforceable at law, but was an equitable understanding and one which could only be urged in a court of equity. The averments of the bill being taken as true on the hearing of this motion, we are of the opinion that it cannot be said that the plaintiff had an adequate remedy at law.

In this court it is also charged that the circuit court of Cheboygan county did not have jurisdiction to restrain the suit in Bay county by reason of the following

provision of Act No. 283, Pub. Acts 1915 (3 Comp. Laws 1915, § 12662):

"No injunction shall issue to stay the trial of any personal action in a court of law, until the party applying therefor shall execute a bond, with one or more sufficient sureties, to the plaintiff in such action at law in such sum as the circuit judge or other officer allowing the injunction shall direct, conditioned for the payment to the said plaintiff, or his legal representatives, of all moneys which may be recovered by such plaintiff, or his representatives, or the collection of which may be stayed by such injunction in such action at law for debt or damages and for costs therein; and also for the payment of such costs as may be awarded to them in the court in chancery, in the suit in which such injunction shall issue; *but no writ of injunction shall issue from any court of this State which will operate to stay any suit or proceeding pending in any court of the United States, or in any other court of this State, except it be issued by a judge of the court having the same territorial jurisdiction as the court in which such suit or proceeding is pending.*"

During the same session of the legislature, Act No. 314, Pub. Acts 1915 (3 Comp. Laws 1915, § 12004 *et seq.*), known as the "judicature act," was passed, and by that act all acts or parts of acts inconsistent with and contrary to its provisions were repealed. Said Act No. 283, Pub. Acts 1915, was re-enacted, except the portions of the act italicized above, which was omitted. In our opinion it must be said that said Act No. 314 repealed so much of Act No. 283 as is clearly inconsistent with its provisions. Act No. 283, Pub. Acts 1915, was in force and effect from August 25 to January 1, 1916, when the judicature act went into effect. The bill of complaint in this case was filed January 1, 1916, and the injunction was issued January 10, 1916, so that it appears that neither the bill nor the injunction can be said to be affected by said Act No. 283, Pub. Acts 1915, which was not then in force.

Being of the opinion that the bill of complaint sets up grounds for equitable relief, we affirm the order of the circuit judge denying the motion to dismiss, with costs to the appellee. The case will be remanded to the circuit court in chancery; the defendants to file their answer within 15 days thereafter.

STONE, C. J., and OSTRANDER, BIRD, MOORE, STEERE, BROOKE, and PERSON, JJ., concurred.

WEAVER v. MICHELLO.

1. HOMESTEAD—HUSBAND AND WIFE—SIGNATURE OF WIFE—ESTATE BY ENTIRETY—CREATION.

The conveyance of a homestead to a third party executed by the husband alone, for the admitted purpose of creating an estate by the entirety, vested the intended estate in the husband and wife, to whom a reconveyance was forthwith executed, absence of the wife's signature not avoiding the conveyance under Art. 14, § 2, of the Constitution, which was for the protection of the wife's interest.

2. DOWER—INCHOATE RIGHT—ESTATES—MERGER.

Since the inchoate right of dower is not such an estate as gives the possessor a different title or estate than that of her husband, the dower right merged in an estate by the entirety, which was created without her joinder. Where dower and fee combine in the same person dower merges in the greater estate.

OSTRANDER, J., dissenting.

Appeal from Bay; Collins, J. Submitted June 13, 1916. (Docket No. 59.) Decided December 21, 1916.

Bill by George Weaver and another against Lydia M. Michello and another for the cancellation of certain deeds. From a decree for defendants, all parties appeal. Modified and affirmed.

Stoddard & McMillan and *C. W. Hitchcock*, for complainants.

W. B. Henry, for defendant Lydia Michello.

On February 7, 1911, Morris L. Michello was living on a piece of real estate in Bay county which was his homestead, and on that day Lydia Michello, his wife, filed a bill for divorce against him which was settled amicably two days later. At the time of the settlement of this litigation, Morris Michello made a deed of the homestead to Fred E. Shearer and his wife, and on the same day and immediately thereafter said Fred E. Shearer and his wife made a deed of the same premises to Morris Michello and his wife, Lydia, as husband and wife. These deeds were executed at one and the same time and without consideration, Morris Michello also signing an agreement by which a resumption of the marriage relation was agreed to. The parties lived together for some time, and a second suit for divorce was brought, pending which Morris died.

The bill in the instant case was filed by Louis Michello and Francis Michello, the two sons of Morris Michello, against Lydia M. Michello, the widow of Morris Michello, and Orilla Trudel, who is also a daughter of the deceased. It is contended that the deeds are a cloud upon the plaintiffs' title to the land, and it is prayed that the deeds be set aside and general relief given. Their contention is that the deed from Morris Michello to the Shearers is void because Lydia Michello did not join in it, and that therefore the Shearers had no title to the land to convey, and hence the defend-

ant Lydia Michello has no interest in the premises except her dower interest; and, *secondly*, they contend that, if the deeds are not void, they did not establish an estate by the entireties, but rather a tenancy in common.

It is the contention of the defendants that the deeds are valid and created a tenancy by the entireties, and upon the death of Morris Michello his wife became the owner of the fee.

The learned trial judge held that the deeds were valid, but concluded that the legal effect of the deeds was to create a tenancy in common. The plaintiffs and defendants both appeal to this court, and the construction to be placed upon these deeds is the only question for review.

KUHN, J. (*after stating the facts*). It is clear, I think, that in contemplation of law no fee to the property in question rested for a single moment in the Shearers, as they were mere instruments used for the purpose of conveying title. There can be no doubt but that the entire transaction was made and executed for the purpose of creating a greater estate in the wife, Lydia Michello, and for her benefit.

The homestead provision in our Constitution is a wise provision, and our court has uniformly held that, in order to create a valid conveyance of the homestead, it must have the signature of the wife. But it was only in cases where giving validity to the deeds impaired or destroyed the homestead right. This court said, in *Stevens v. Castel*, 63 Mich. 111, 120 (29 N. W. 828, 831):

"A deed from the husband to a third person of a homestead for the mere purpose of transferring the title to the wife which is accomplished by the grantee at once executing a deed to her, is not void for want of her signature. The whole transaction should be treated in law as a conveyance from the husband to the wife.

"If the deeds were ever delivered and passed the title, Mullinnex was a mere instrument in the hands of the parties for the purpose, and the only purpose, of transferring the title from the husband to the wife. In such a case I do not think the deed to Mullinnex would be void without her signature. It should be treated—the whole transaction—in law as a simple conveyance from the husband to the wife. The object of the homestead provision in this respect is to protect the interest of the wife, and these conveyances inured only to her benefit, and were not in any sense against any of her rights, or of the family, in the homestead."

So in this case the homestead rights were in no way legally affected by the execution of the two deeds of February 9th and remained with the defendant Lydia Michello and the family as well after the execution of the deeds as before. The obvious purpose of the constitutional provision (section 2 of article 14) is in no wise impaired, and I am therefore of the opinion that it should not be said that the deeds are void because of the constitutional provision which makes an alienation of the homestead invalid without the signature of the wife to the same.

The learned trial judge was of the opinion that the failure of Lydia Michello to join in the deed to the Shearers, and the failure thus to transfer to them her dower right, prevented the unity of title necessary to create an estate by entirety, and therefore a tenancy in common was created instead. I am of the opinion, however, that this conclusion is not well founded, for the reason that in an estate by the entirety the husband and wife are not seised by the moieties, but are seised by the entirety, or, as it has been said, "Each is seised of the whole," and any inchoate right of dower which Lydia Michello may have had in the premises merged when she became seised of the whole estate by the deed from Shearer and wife.

The inchoate right of dower is not such a right

that could be said to have given Lydia Michello a different title or estate than her husband, but it was a mere inchoate interest such as could be released or abandoned, and merged into the title when the dower and the fee combined in the same person. When Morris Michello died, Lydia Michello, being seised of the whole, took the whole estate, and her right of dower is therefore nonexistent and of no benefit to her.

In *Pegg v. Pegg*, 165 Mich. 228 (130 N. W. 617, 33 L. R. A. [N. S.] 166, Am. & Eng. Ann. Cas. 1912C, 925); *Wright v. Knapp*, 183 Mich. 656 (150 N. W. 315), and *Michigan State Bank v. Kern*, 189 Mich. 467 (155 N. W. 502), the formalities necessary to create a tenancy by the entireties were not observed. But in my opinion by the conveyance in question all the legal requirements to create an estate by the entireties were observed, and such an estate was therefore created.

The decree of the lower court will be therefore modified in accordance with this opinion. As this was a settlement of a family matter and a construction of the deeds was sought by both sides to the controversy, no costs were allowed by the lower court to either party as against the other. Such an order will likewise be made here.

STONE, C. J., and BIRD, MOORE, STEERE, BROOKE, and PERSON, JJ., concurred with KUHN, J.

OSTRANDER, J. (*dissenting*). Morris L. Michello was the owner of the premises. He executed a conveyance of them to Fred E. Shearer. As a consequence, title to the premises, and ownership, did, or did not, pass to Shearer. It did not pass because the land was a homestead and the wife of Michello did not join in the conveyance. If Shearer acquired no title, he could not by his own deed create, or convey,

an interest in the land. Yet it is plain that the widow is claiming an estate, created, if at all, by Shearer's deed. It will not do to say that the occupancy of the land, for a homestead, was not actually disturbed by the transaction, and was not intended to be. The owner, by his deed, alienated the land, and his deed is therefore void. *Ex nihilo nihil*.

The quotation from the opinion of Mr. Justice MORSE in *Stevens v. Castel*, 63 Mich. 111, 120 (29 N. W. 828), is the expression of the individual opinion of that judge, who expressly states that a charge to the contrary was an error not affecting the result of the trial "and is of no moment here."

On the contrary, in *Lott v. Lott*, 146 Mich. 580 (109 N. W. 1126, 8 L. R. A. [N. S.] 748), reasoning for and against the proposition that the constitutional provision can be evaded was presented, with a review of former decisions, with the result that the court adhered to the rule that the conveyance of a homestead, by a married man, to a third person, must, to be valid, have the signature of the wife. See, also, *Lawrence v. Vinkemulder*, 157 Mich. 294 (122 N. W. 88).

The husband was owner of the land when he died. The land belongs to his heirs at law, subject to the widow's rights therein.

NORRIS v. DETROIT UNITED RAILWAY.**1. STREET RAILROADS—EXCAVATIONS—STREETS—NEGLECT.**

Where plaintiff fell into an excavation of the defendant railway, in the streets of the city of Detroit, and sustained severe injuries, the trial court did not commit error in instructing the jury, in substance, that, if the rain and storms that might be expected at that time of the year put the street out of repair and rendered it dangerous, defendant would be chargeable with negligence, but, if they found that a storm of unusual severity, or one that might not be expected under ordinary circumstances and conditions, came up, then it would be something that human foresight could not prevent and would be an extraordinary visitation and the defendant would not be chargeable with negligence.¹

2. EVIDENCE—MORTALITY TABLES—PREVIOUS DISEASE.

The mortality tables were improperly received in evidence in a personal injury action in which plaintiff admitted she had a weak heart and had suffered from goitre or what was described as "Graves Disease," which was almost cured and where her condition was aggravated by the accident.²

3. SAME—PERMANENT INJURIES.

Upon testimony of plaintiff's physician that the injury to her ankle was of a permanent nature, the court was right in submitting to the jury the matter of damages.

4. SAME—COMPROMISE AND SETTLEMENT—AGENCY.

A question asked of defendant's claim agent, whether or not he had been authorized to settle the case, was clearly incompetent. But where the court charged the jury that the remark of counsel was not for their consideration and that the matter of compromise could not be considered at all, the court on error would not hold the error prejudicial, especially when the question was not answered.

¹On the question of liability of street railways for defects in tracks or street, see notes in 52 L. R. A. 443; 15 L. R. A. (N. S.) 840.

²On admissibility of mortality tables in evidence in action for personal injuries, see note in 40 L. R. A. 553.

5. SAME—APPEAL AND ERROR.

The court, furthermore, will not reverse a case on error for argument of counsel not shown by the record but presented by affidavits, the trial court returning that he did not so understand the alleged objectionable argument.

6. SAME—TRIAL—DAMAGES.

Future damages are limited to such as the evidence makes reasonably certain will necessarily result from the injury sustained, and it was error to advise the jury that they might award such sum as would compensate plaintiff for the injuries she would be likely to suffer in the future.

Error to Wayne; Des Voignes, J., presiding. Submitted June 16, 1916. (Docket No. 148.) Decided December 21, 1916.

Case by Myrtle Ida Norris against the Detroit United Railway for personal injuries. Judgment for plaintiff. Defendant brings error. Reversed.

Corliss, Leete & Moody and *William G. Fitzpatrick*, for appellant.

William M. Mertz, for appellee.

KUHN, J. The plaintiff, an unmarried woman about 24 years of age, brought the action to recover damages resulting from her falling into an excavation made by the defendant in the course of the construction of its tracks on Grandy avenue north from Gratiot avenue in the city of Detroit. On a former trial the plaintiff obtained a verdict, and the judgment entered thereupon was reversed and a new trial granted because of the errors in the admission of testimony. This decision is reported in 185 Mich. 264 (151 N. W. 747). On the new trial a judgment for the plaintiff in the sum of \$2,055 was obtained, and the case is again brought here by writ of error.

The facts surrounding the injury are so fully set forth by Mr. Justice STONE in the previous opinion of

this court that it will be unnecessary to repeat them here.

It is argued in appellant's brief that there was no proof of negligence, and that therefore the court should have directed a verdict for the defendant. Upon the argument of the case, however, counsel for defendant and appellant stated that he was of the opinion that the record did raise questions which should have been submitted to the jury. With this we agree, as the proofs in support of plaintiff's claim differed but little from those introduced on the previous trial.

In the previous opinion it was said:

"If the jury should find, as matter of fact, that the storm was an unusual and extraordinary one, and one which the defendant could not, in the exercise of ordinary care, reasonably expect, we think the question then should have been clearly put to the jury whether the defendant had had a reasonable time in which to restore the lights before the accident happened; and they should have been instructed that if it had not had a reasonable time in which to restore the lights, in case the storm was of such a nature, then there would be no liability. Whether it was such a storm as it might reasonably expect and provide for at that season of the year was also a question for the jury. The idea is embraced in the charge of the court in *Beattie v. City of Detroit*, 137 Mich. 319, at page 324 (100 N. W. 574, at page 576), where the charge of the trial court was approved by this court:

"'Did they do all that prudence and foresight would demand of them? In other words, if the rain and storms that might be expected, if you believe that they might be expected at that time of the year, would put that street out of repair and render it dangerous, then, gentlemen of the jury, in my opinion, negligence would be chargeable against the city; but if you find that a storm of unusual severity, or a storm that might not be expected under ordinary circumstances and conditions at that time of the year, came up, then it is something human foresight cannot see or prevent, and that would be an extraordinary visitation of the elements, and the city * * * would not be, in such a case, chargeable with negligence.'

"And the rule of reasonable time in which to remedy the defect would apply."

The trial judge on the new trial practically submitted the question in issue in the language approved in *Beattie v. City of Detroit, supra*.

The next assignment of error relates to the admission of the mortality tables. It appears that the plaintiff, before the accident involved in this litigation, was suffering with a goiter, or what is known as "Graves Disease." Plaintiff herself admitted this in her testimony and said that before the accident she had a weak heart because of the goiter, and claimed that she was almost cured, and that her condition was aggravated by the accident. The trial judge withdrew from the jury any question of permanent injury so far as the goiter was concerned, but did submit to the jury the question of permanent injury to her ankle. Dr. Zaeger testified that in his opinion the injury to the ankle was permanent, and that there would be no improvement in the condition caused by plaintiff's fall. We are of the opinion that this testimony was sufficient to warrant the trial judge in submitting the question of permanent injury to the jury; but, in view of the fact there is no question that the plaintiff was not in average physical health and vitality at the time of her disabling injury, we are constrained to hold that it was error to receive the mortality tables and submit them for the consideration of the jury. In the absence of any testimony to show how much her expectancy of life was impaired by the pre-existing pathological condition, the tables could furnish no safe guide as to the probable duration of the disabling injury.

In *Denman v. Johnston*, 85 Mich. 387 (48 N. W. 565), this court in speaking of the mortuary tables said:

"But their use in trials for negligent injuries not causing death requires great caution on the part of the trial court. The expectancy of life in those tables is based upon the lives of healthy persons who are of the ages indicated; and it cannot be said, as was said by the trial judge in this case, that a party who, prior to the injury complained of, was afflicted with hernia, which had been aggravated by such injury, and who was also suffering from internal injuries, as claimed, had an expectancy of life at the age of 52 of 17 years, or any other number of years. The tables furnish no basis of expectancy of such a life. They do form a basis of the expectancy of life of a healthy person of the age of 52, and such expectancy is stated in the tables to be 19.49 years; but other testimony of experts would be required to show what the plaintiff's expectancy of life would be, taking into consideration his ailments, and the effect they would probably have to shorten his expectancy. Such testimony must necessarily be problematical, but perhaps it is the best that is attainable to establish the probability."

See, also, *Clinton v. Laning*, 61 Mich. 355, at page 361 (28 N. W. 125).

In *Wilkins v. City of Flint*, 128 Mich. 262 (87 N. W. 195), in which case the tables were admitted where it was claimed that the plaintiff, a woman, was not a person in the average health, it was said:

"It is now claimed that the plaintiff was not a woman of average health at the time of the accident, and that the tables should have been excluded, under the authority of *Denman v. Johnston*, 85 Mich. 387 (48 N. W. 565). Had the fact that she was not an ordinarily healthy person been admitted or undisputed, the tables would have had no bearing; but, being disputed, they were admissible, to be used or not by the jury, according to their conclusion upon the question of fact."

If, in the case before us, it had appeared that there was any dispute about the question of whether or not the plaintiff was an ordinarily healthy woman, then

that question would have been for the jury, and the mortality tables would be admissible for them to use if they should find that she was an ordinarily healthy woman. But, as we have said, there is no question but that plaintiff was not what could be called an ordinarily healthy person at the time of her injury, and therefore the mortality tables should not have been admitted, and it must be said to be prejudicial error for the court to have submitted them to the jury for their consideration.

During the examination of defendant's claim agent, Jansen, he was asked by plaintiff's counsel whether he had been authorized to settle the case. Objection was made, and the question was not answered, and the court immediately charged the jury in the following language:

"Gentlemen, that remark, of course, is not for your consideration at all, and I trust and have no doubt you will give heed to the rulings of the court in relation to the testimony which should go in or not go in. It is a rule of law that a matter of compromise is nothing for the jury to determine one way or the other. There is nothing here as to such a fact at all; and, even if there was, it could not be considered by you, because the law favors compromises, and for that reason they do not allow it to be permitted to enter into the evidence in any way. Counsel asked the question, and the court ruled that the witness should not answer. Exception has been taken to that as being prejudicial, and you will remember that under no circumstances have you the right to assume or presume anything in the answer to that question. If you do so, you violate your oaths."

The question was clearly improper, and Jansen should not have been asked it; but we are not prepared to say that it was prejudicial error in view of the instructions which the trial judge immediately gave to the jury.

It was sought to show by affidavits that during the argument of plaintiff's counsel to the jury improper statements were made. The record does not show what these statements were, as the stenographer made no minutes of them, and the trial judge stated at the time that he had not understood the statement to have been what was claimed for it by defendant's counsel. We cannot review this alleged error, for this court in reviewing errors of the trial court must be governed by the record and the statements of the trial court, rather than the claims of counsel as to what occurred at the trial. *Pinkerton v. Bromley*, 128 Mich. 236 (87 N. W. 200); *Spacek v. Schaub*, 140 Mich. 212 (103 N. W. 546); *Hews v. Hews*, 145 Mich. 247, 255 (108 N. W. 694).

In charging the jury on the question of permanent injuries and disability, and future damages growing out of the impairment and disability of plaintiff's ankle, the court said:

"If you find for the plaintiff, it will be your duty to award such a sum as will compensate her for whatever pain and suffering and inconvenience she has experienced in the past by reason of her injuries, and for such as you may find from the testimony she is likely to experience in the future; also, for the loss of wages, if any in the past, and what she is likely to lose in the future, if any. * * *

"Now, you may take into consideration whatever handicap you may find she has been or may be caused by this injury, in obtaining her rest and the performance of her usual duties, and such loss of enjoyment to her in the usual routine of her life as you may find her injuries have or may cause. * * *

"A person who receives an injury has but one right of action. When he comes before a jury once, that is the end of his case, and if she or he comes before a jury he or she is entitled to receive for injuries in the past and which may be endured in the present."

It is urged that these portions of the charge are

erroneous, in that they do not follow the rule announced by this court in *Brininstool v. Railways Co.*, 157 Mich. 172, 180 (121 N. W. 728); *Kethledge v. City of Petoskey*, 179 Mich. 301, at pages 311, 312 (146 N. W. 164); and *Matthews v. Lamberton*, 184 Mich. 493 (151 N. W. 563). The rule is well settled by these cases that future damages are limited to such as the evidence makes reasonably certain will necessarily result from the injury sustained, and the instructions should have been given in the language there approved.

The judgment must be reversed, and a new trial granted, with costs to the appellant.

STONE, C. J., and OSTRANDER, BIRD, MOORE, STEERE, BROOKE, and PERSON, JJ., concurred.

DICKINSON v. HANLEY.

1. BROKERS — REAL ESTATE SALE — COMMISSIONS — CONTRACTS — EVIDENCE.

A real estate broker, who secured a purchaser for a parcel of realty which the several owners did not employ plaintiff to sell, was not entitled to maintain an action for his commissions against one of them who represented, as he claimed, that she had absolute power to dispose of the land, and the court did not commit error in directing a verdict against the agent for the reason assigned that he was a mere volunteer and there was no competent proof of misrepresentation, which, in part, rested upon hearsay.¹

¹On what constitutes employment of broker which will entitle him to commissions otherwise earned, see note in 27 L. R. A. (N. S.) 786.

2. SAME—FRAUD—EVIDENCE.

Evidence *held*, to be insufficient to support a charge of fraud.

Error to Wayne; Hally, J. Submitted June 16, 1916.
(Docket No. 141.) Decided December 21, 1916.

Case by Stanley R. Dickinson against Elizabeth W. Hanley and others for broker's commissions and for fraudulent misrepresentations. Judgment for defendants on a directed verdict. Plaintiff brings error. Affirmed.

Dickinson & Dickinson (Benj. S. Pagel, of counsel),
for appellant.

A. B. Hall, for appellees.

PERSON, J. It appears from the record that plaintiff is a real estate broker in the city of Detroit. His method of doing business, according to his own description of it, is as follows:

"I go to the records in the city hall and get the names of the owners, or I go right to a certain piece of property, and ask who the owner is; then, if the owner lives there, I call on him."

If the property is for sale, plaintiff says he picks up such information about it as he can, and starts out to find a purchaser. It is to be inferred from his testimony that he usually arranges with the latter for his compensation. In stating the origin of the present action, plaintiff says:

"In February, 1914, during one of these listing canvasses, I called at 63 Watson street."

No. 63 Watson street is the property in question in this case. He there met Mrs. Campau, one of the defendants, and learned from her that the property belonged to Mrs. Hanley, and that it was for sale. Mrs. Campau also informed him that the price asked

was \$22,000. He then departed in search of some one who might be induced to make the purchase. After calling upon several gentlemen without avail, he was finally able to interest a Mr. Alvin G. Sherman and the latter's father and brother in the matter. These gentlemen, however, seem not to have been willing to pay \$22,000 for the property. Plaintiff, therefore, again visited No. 63 Watson street, and was able this time to see Mrs. Hanley herself. Her daughters, Mrs. Campau, hereinbefore mentioned, and Mrs. Kern, the other defendants, were also present. He says that at this time Mrs. Hanley told him the property was owned by four heirs, but that they had given her absolute power to sell it.

Plaintiff also testifies that he had hoped to be able to get the property for \$16,000, but found he could not. He did, however, succeed in getting Mrs. Hanley to sign a written contract, running to "Alvin G. Sherman *et al.*," by which she agreed to make a conveyance for \$19,000. Of this amount \$500 was to be paid immediately, and the balance at a later period. Having secured Mrs. Hanley's signature to the contract, he returned to the Shermans, who also signed it. At the time the contract was being executed by Mrs. Hanley, he asked Mrs. Campau and Mrs. Kern to sign it as witnesses. This they did, but in signing it he had them place their names below that of Mrs. Hanley, as if they were parties. Upon plaintiff's return to the Shermans with the contract, they executed an agreement in writing to pay him a commission of \$570 for securing the sale. The agreement states that such payment is understood to be his profit on the agreement to buy and sell secured by him from Mrs. Hanley.

Upon the tender of a check, a little later, to Mrs. Hanley, as payment of the \$500, she repudiated the entire transaction, and refused to proceed farther with the sale. A bill was filed by the Shermans for spe-

cific performance, but for some reason, not clearly explained in the record, the suit was discontinued. Plaintiff then brought this action against Mrs. Hanley and her daughters for the loss of the commission he was to have received from the Shermans.

His claim, if we rightly understand it, is based upon two theories:

First, that the defendants, by refusing to perform the contract, became indebted to him for services in procuring a purchaser; and, *second*, that defendants misrepresented the authority of Mrs. Hanley to make the sale.

At the close of plaintiff's proofs, the trial court directed a verdict against him; and in this the trial court was undoubtedly right. Plaintiff utterly failed to show any contract relations whatever between himself and the defendants, or either of them. He does not testify that they ever asked or in any way employed him to dispose of the property. So far as they are concerned, he was a mere volunteer, hoping to get a commission out of the purchaser. That being true, a misrepresentation as to Mrs. Hanley's authority to make the sale, even if there were such a misrepresentation, could not be made the basis of an action in his behalf. But there is no competent proof showing that there was a misrepresentation. Plaintiff was told, so he says, after the deal fell through, that a party, other than the defendants, would have to be consulted before a sale could be effected. But he fails to furnish any evidence of the fact other than his own hearsay information.

The judgment is affirmed.

STONE, C. J., and KUHN, OSTRANDER, BIRD, MOORE, STEERE, and BROOKE, JJ., concurred.

PEOPLE v. MCCLINTIC.

1. PERJURY—WARRANT—GROUNDS—JUSTICES OF THE PEACE—PRELIMINARY EXAMINATION.

Respondent was charged with perjury for giving false testimony relative to the purchase of intoxicating liquors from a colored person who was accused of unlawfully furnishing intoxicating liquors. Respondent was given two marked one dollar bills and entered the pool room of the accused and returned with two pints of whisky, which he stated that he bought of the accused. He made a sworn statement to that effect when the warrant was issued. Later, he gave evidence on the examination that he did not purchase the whisky of accused and did not pay him the marked bills which he had received. The people produced evidence that tended to show the contradictory statements of respondent on the two occasions and that he had informed certain witnesses of the purchase of the whisky. The justice of the peace who issued the warrant testified to the statements made by respondent at the time of issuing the warrant. They were not reduced to writing. *Held*, that the object of the examination before the justice, under 3 Comp. Laws 1915, § 15666, is to determine the sufficiency of the ground for a warrant and the evidence need not be written down, also that there was evidence which required the submission of the case to the jury.

2. SAME—CRIMINAL LAW—TRIAL.

Contradictory statements, whether made under oath or not, do not authorize a conviction for perjury, although the additional testimony of another witness to the falsity of the statement is not required if the truth may be inferred from the combined facts proven. The prosecution, however, must prove which of the two statements is false and by other evidence than the contradictory statements.

3. SAME—INTENT—TRIAL—CHARGE—MATERIALITY.

Held, that the jury should have been instructed on the point whether or not perjury was committed at the time laid in the information, *i. e.*, the evidence given by respondent when he was called as a witness or whether re-

spondent swore untruthfully on the prior occasion, and that wilful false swearing before the magistrate upon a material matter before the complaint had been made would constitute perjury.

4. SAME—EVIDENCE—JURY QUESTION.

Testimony of the respondent that he was frightened or cajoled by the officers and by the justice of the peace before whom complaint was made into swearing to the same, and by the use of third degree methods, and, in effect, that his testimony at the subsequent examination was true, presented a proper issue for the jury.

5. SAME—REQUESTS TO CHARGE—REASONABLE DOUBT.

The court, in giving his instructions to the jury, should have granted respondent's request to charge that, in considering the guilt or innocence of the respondent, before they could convict they must find that the people have proved beyond a reasonable doubt in their minds that the matters sworn to were false in fact and that they must find the respondent did go to the place of business in question and purchase the whisky as charged; further, that they could not find the respondent guilty of testifying falsely upon the testimony of one witness whose testimony is given to prove the falsity of the statement; that in addition to the statement of the witness strong corroborating circumstances of such a character as would clearly turn the scale and overcome the oath of the party accused must be shown.

6. SAME—TRIAL—CHARGE.

If the preliminary testimony made it clear that the statement claimed to have been made was voluntary or involuntary it was the duty of the trial court to admit or reject it; if the matter was left in doubt, it was the duty of the court to admit it and leave the question to the jury under proper instructions to determine whether it was voluntarily made; the jury should have been explicitly advised on this issue.

7. SAME—PRESUMPTION OF INNOCENCE—INSTRUCTIONS.

The court did not substantially cover the subject of the presumption to be considered, by telling them that the burden rested on the prosecution and the accused came into court clothed with the presumption of innocence, and he stands innocent in their minds until the people, through the prosecuting attorney, had convinced them of his guilt

beyond a reasonable doubt; that a reasonable doubt meant a doubt which a reasonable man might have, not a capitious doubt; that the matter did not require mathematical exactness, but the people must prove beyond a reasonable doubt that respondent was guilty, etc.

Error to Ingham; Collingwood, J. Submitted October 12, 1916. (Docket No. 125.) Decided December 21, 1916.

Nelson McClintic was convicted of perjury. Reversed.

Grant Fellows, Attorney General, *William C. Brown*, Prosecuting Attorney, and *J. Arthur Boice*, Assistant Prosecuting Attorney, for the people.

W. J. Carbaugh and *S. B. Roe*, for respondent.

STONE, C. J. The defendant was charged with, and convicted of, the crime of perjury, alleged to have been committed on April 7, 1916, at the city of Lansing, on the examination of one Theodore De Meaux, at a court held by Charles F. Haight, a justice of the peace, the said De Meaux being charged before said justice, on the complaint of one Frank Eurek, with the offense of unlawfully furnishing intoxicating liquor to the defendant herein, on March 24, 1916, at the city of Lansing, in violation of Act No. 207, Pub. Acts 1889, as amended.

The information in the instant case charges that upon such examination before said justice it then and there became and was a material question whether the said De Meaux did, on March 24, 1916, sell certain intoxicating liquor, to wit, whisky, to the defendant herein, and whether the defendant then and there paid to said De Meaux any money for the said whisky.

No question is raised as to the sufficiency of the information, nor is it denied that upon such criminal

examination the defendant herein, in substance, testified that he did not purchase any intoxicating liquor from the said De Meaux at the time and place stated; nor is it denied that he, in substance, testified that he did not give or pay any money to the said De Meaux at the time and place alleged. It is conceded that such testimony was material to the issue. The matters which preceded this examination become material.

It is the claim of the people that, on the evening of March 24, 1916, the defendant was given two marked \$1 bills by one Carl Hambruck; that they went together to the pool room of said De Meaux, in the city of Lansing; that this defendant went into the pool room of said De Meaux with said money and soon thereafter came out with two pints of whisky, which he said he purchased from De Meaux with the \$2; that Police Officer Eureka, who had marked the bills and had furnished them to Hambruck, and who saw the defendant go into De Meaux's place and come out again, and who took the liquor from him afterwards, went the same evening before Charles F. Haight, a justice of the peace of the city, and made, signed, and swore to a complaint against said De Meaux, charging him with having furnished whisky to the defendant; that the defendant, after such complaint was made and before the warrant was issued, went before the said justice and was there sworn and examined as to the matters charged in the complaint, and testified that he had that evening purchased two pints of whisky from said De Meaux, for which he paid said De Meaux \$2. A warrant was issued upon the complaint and examination, and said De Meaux was immediately arrested. The people claimed that, at the time of his arrest, De Meaux was seen to throw these marked bills into his woodpile, and later claimed the money was his and took it; that defendant stated, not only on oath before said justice, but also to Eureka and one Mer-

rick, that he had purchased two pints of whisky from said De Meaux on the occasion in question, and had paid him \$2 for it. Then, on said April 7th, came the examination before the justice, above referred to, in which it is claimed by the people that defendant committed perjury in swearing that he did not purchase any liquor from, or pay any money to, said De Meaux on March 24, 1916. This is a case where it is claimed that defendant first swore before the justice that he had purchased intoxicating liquor from Theodore De Meaux, and did pay him \$2 therefor; and later, upon the occasion charged as perjury, he swore that he did not purchase intoxicating liquor from said party. and did not pay him any money

It becomes important to examine the evidence as to whether defendant was sworn and examined in support of the complaint by the justice before the warrant was issued.

Upon the trial of the instant case, Charles F. Haight, the justice, was sworn. He testified as follows:

"I am justice of the peace of the city of Lansing. I am acquainted with Nelson McClintic. I saw Nelson McClintic on the 24th day of March, last, in my office in the city hall in Lansing, if I remember correctly, around about 10 o'clock, perhaps a little later, and the occasion of his being at my office was, I had been called down there in regard to issuing a warrant for Theodore De Meaux for violation of the local option law. Mr. Eurek and Mr. Hambruck were at my office at the time, and a few minutes later Mr. McClintic was there. If I remember correctly, Mr. Hambruck went out soon after, or about the time McClintic came in. There was a complaint against De Meaux at that time. The complaint was signed by Frank Eurek. Upon that occasion I swore Mr. McClintic as to the matters charged in the complaint. * * * I asked McClintic what there was about the fact of the statement made by Mr. Eurek that he had purchased liquor of De Meaux that night, and he said that Hambruck

gave him two \$1 bills and told him that if he would go to De Meaux's and purchase two pints or one quart of whisky he would give him half of it for doing it. He stated that he went to De Meaux's place, bought two one-pint bottles of whisky, and gave him the two \$1 bills that Hambruck had given him to purchase the liquor with, to De Meaux, and that he came away with the two one-pint bottles of whisky, that he gave one pint of whisky to Hambruck and kept the other pint himself.

"Q. I will ask you if that is the testimony upon which you issued the warrant in this case?

"A. Yes, sir."

The record does not disclose any testimony contradicting the above testimony as to the time and manner of the examination on oath of the defendant.

Section 11839, 3 Comp. Laws, being section 15007, 5 How. Stat. (2d Ed.) (3 Comp. Laws 1915, § 15666), provides as follows:

"Whenever complaint shall be made to any such magistrate, that a criminal offense, not cognizable by a justice of the peace, has been committed, he shall examine on oath the complainant, and any witnesses who may be produced by him."

The object of this examination is to determine the existence of ground for the warrant, and need not be reduced to writing. *People v. Bechtel*, 80 Mich. 623 (45 N. W. 582); and see notes to above section 15007, Howell.

There was evidence upon the trial in support of the above claim of the people.

The defendant testified upon the trial, in substance: That Hambruck came to his room where he was living, about 9 o'clock of the evening of March 24th, and produced and offered to the defendant some whisky. That defendant claimed that he went out with Hambruck upon the street, at his request, and that Hambruck said he needed some more whisky, and that he

had been to De Meaux's place and could not get it, and he asked the defendant to go and see if he could not get some from De Meaux, and that Hambruck then gave him two \$1 bills. That defendant took the money and went to De Meaux's place. That he tried to obtain the whisky from De Meaux and was refused, De Meaux stating that he did not sell any whisky, and that De Meaux did not sell him two one-pint bottles that night, nor any whisky, and that defendant did not pay him any money that night at all. That when he came out of De Meaux's place he met Hambruck and walked around with him and gave back to him the money which Hambruck had furnished him. That Hambruck then furnished the defendant with a drink of whisky and said that he had another bottle. About this time defendant claims that they met the officer Eurek, and he said, "I want both of you boys." That the officer took him and Hambruck to the city hall, where the whisky which Hambruck had furnished the defendant was taken from him, and also some whisky was taken from Hambruck; that the officers expressed great anxiety to arrest De Meaux. The defendant testified: That at this time the chief of police came in and abused him, swore at him, called him a "damned liar," shook his fist in his face, threatening to strike him. That first one would question him, then another, and this abuse was continued. That the justice said to him, "What are you here for?" That he told him because he could not get away; that they brought him there. Whereupon the justice said, "You might as well tell us all about it," and commenced to laugh, and defendant told him he had nothing to tell, and then he started asking questions, and the chief and Eurek abused him and called him a liar. That Eurek took him alone and said:

"You might as well come clean and tell this. You can be home in 15 minutes and in bed, because it is

not you we want; it is the nigger we have been after."

That the treatment of the police officers and the justice made him nervous. That he was soon after placed under arrest for having furnished liquor to Hambruck, and he was taken to Mason and confined in jail, but was never tried upon the charge of violating the local option law. The defendant testified that he had been drinking some whisky furnished him by Hambruck. He denied that he told them that he got the whisky from De Meaux, and also denied the purchase of any whisky from De Meaux; that they kept this abusive language up for three-quarters of an hour before he was taken to the justice's office. He testified that he had no recollection of going to De Meaux's and coming back with whisky, and claims that he did not remember what he said before the justice.

At the close of the people's case, there was a motion for a directed verdict of not guilty, for the reasons that there was no proof in the case showing that defendant bought the liquor from De Meaux, and that the only proof that defendant swore falsely upon the examination was his own admission, and that such admissions and statements, being extrajudicial, were not sufficient to establish the charge unless supported by other substantive proof, of which there was none. The motion was overruled, and defendant's counsel excepted.

There was other evidence tending to corroborate some portions of the defendant's testimony

The court was requested to charge the jury, among other things, as follows:

"(1) I instruct you in considering the guilt or innocence of the respondent, before you can convict you must find that the people have proved beyond a reasonable doubt in your minds, * * * that the matters sworn to were false in fact, and that this respondent knew at the time he made these statements under

oath that they were false. In other words, gentlemen, in order to find this respondent guilty as alleged, you must find as a matter of fact that on the 24th day of March last this respondent did go to Theodore De Meaux's place of business on Ionia street in the city of Lansing, and there did purchase from the said Theodore De Meaux two one-half pints of whisky.

"(2) I instruct you that you cannot find this respondent guilty of testifying falsely upon the testimony of one witness whose testimony is given to prove the falsity of this statement so made, for that would only be oath against oath. It is necessary that, in addition to the testimony of one witness to the falsity of the statement alleged to have been perjury, that strong corroborating circumstances of such a character as will clearly turn the scale and overcome the oath of the party charged should be proven. * * *

"(4) Now, gentlemen of the jury, if you find from the evidence that the alleged statement made by this respondent before Charles F. Haight, a justice of the peace, at his office in the city of Lansing, in the evening between the hours of 10 and 12 o'clock p. m., were made under duress, promise, threats, or fear, or excitement, even though they may have been made under oath, they cannot be considered by you as evidence against this respondent. In order for these statements to be used as evidence against this respondent, they must have been made voluntarily and not through coercion or through fear or under excitement, and even then any statement that he may have made at that time, whether under oath or not, can only be considered by you as corroborating evidence of whether or not the testimony given by the respondent on the 7th of April last, upon the preliminary examination before the said Charles F. Haight of Theodore De Meaux, were true or false.

"(5) Gentlemen of the jury, the court instructs you that the respondent in this case is presumed under our law to be innocent of the crime charged until he has been proved guilty beyond any question of reasonable doubt. A 'reasonable doubt' is a doubt which grows out of the testimony in the case. It is not a mere fictitious or an imaginary doubt, but it is a doubt aris-

ing in your minds after you have carefully considered all the testimony in the case. If your mind then is in such condition that you cannot say to a moral certainty that the defendant is guilty, a reasonable doubt exists in your minds and you should acquit him. If you have no such reasonable doubt in your minds under the testimony, then you should convict him. That is what is meant by a reasonable doubt. If, after you have looked this testimony carefully over, you have any reasonable doubt in your minds of this young man's guilt, you should fearlessly say that he is 'not guilty.'"

None of these requests was given by the court. The court did charge the jury upon the subject of the presumption of innocence in the following language:

"In this case, as in all criminal cases, the burden of proof rests on the people, and the man comes into court clothed with the presumption of innocence and he stands innocent in your minds until the people, through the prosecuting attorney, have convinced you of his guilt beyond a reasonable doubt."

The court further charged the jury as follows:

"Now, a 'reasonable doubt' means just what it says, a doubt which a reasonable man might have. It is not a captious doubt. It is not that the matter must be proved as a mathematical problem is proved beyond all peradventure. It simply means that they must prove to you beyond a reasonable doubt that respondent is guilty, before you can so find him.

"In this case, the charge is perjury, false swearing. It might be termed lying in court under oath. Stripped of all its technicalities, the case is this: A certain person in Lansing was apprehended for a violation of the local option law. That is a crime, and when the officers have evidence sufficient they issue a warrant; that is, a justice of the peace or the other properly organized officers would issue a warrant. The man is brought in, or the woman, and the first thing is to give them an examination. Now, in that examination Mr. McClintic was called as a witness, and he was asked if he had bought liquor of this man Theo-

dore De Meaux, and he said, 'No.' And he was asked if he had paid him any money, and he said, 'No.' Well now if that is true, that was very proper testimony for Mr. McClintic to give. But the people claim that as a matter of fact he had actually bought liquor of Theodore De Meaux and had paid him money, and to substantiate their claim they bring forward these people who claim that at certain times and under certain circumstances Mr. McClintic admitted that he had bought this liquor of Mr. DeMeaux and had given him the money. And then they bring forward certain witnesses to testify to certain circumstances which might or might not convince you of the fact.

"Now, gentlemen, the thing for you to determine is this: Did Mr. McClintic, when he testified in that examination that he had not bought liquor of Mr. De Meaux and had not paid him money, did he tell the truth? If he did, you must bring in a verdict of not guilty. But if you believe that he did buy the liquor of Mr. De Meaux, or that he did pay the money to Mr. De Meaux, and if you are convinced of that beyond a reasonable doubt, under all the circumstances that have been given, then your verdict should be guilty.

"Something has been said about his testifying before Justice Haight, and taking an oath there. This question of perjury is not a question of whether he swore falsely before Justice Haight at that time that the warrant was made, but the question of perjury is: Did he swear falsely at the time of the examination?"

The defendant was convicted and sentenced to the State prison. The case is before us upon writ of error, and the assignments of error complain of certain rulings of the court in the introduction of evidence, of the conduct of the trial, of the refusal of the court to charge the jury as requested, and in the charge of the court as above indicated.

1. A careful examination of the record does not disclose any reversible error in the rulings of the court upon matters of evidence during the trial. We think the court did not err in refusing to direct a verdict of not guilty. The case is somewhat peculiar and un-

usual, in that it is the claim of the people that the defendant had made contradictory statements under oath, and that he told the truth when examined before the magistrate before the issuing of the warrant on March 24th, and that he swore falsely and committed perjury upon the examination of De Meaux, held April 7, 1916.

In some of the early English cases it was held that a contradictory statement under oath of a defendant justified a conviction for perjury, and that the jury might infer a corrupt motive from such contradictory statements. One eminent English judge said:

"There is no doubt that what might be called a common-sense conclusion is that if a man deliberately and wilfully on one occasion swore that a fact was so, and on another occasion deliberately swore that it was not so, no doubt he must have been guilty of perjury on one or the other occasion."

We think the better doctrine, as shown by the great weight of authority in this country, is correctly stated in Bishop's New Criminal Procedure, vol. 3, § 931, where that author says:

"Where, on different occasions, the defendant has sworn both in affirmation and denial of the same thing, oath nullifies oath; and the rule that the testimony of one witness will not authorize a conviction does not apply. The further doctrine as to the effect of his contradictory statements, whether made on oath or not, is that in neither case are they alone a sufficient foundation for a conviction for perjury. But the added testimony of an independent witness to the falsity of the one statement is not required where, as often happens, the truth may be otherwise duly evolved from the combined proven facts."

In 2 McClean's Criminal Law, § 891, appears the following statement:

"Proof that accused has given contradictory testimony under oath at a different time will not be suffi-

cient to establish the falsity of the testimony charged as perjury, for this would leave simply one oath of the defendant as against another, and it would not appear that the testimony charged was false rather than the testimony contradictory thereof. The two statements will simply neutralize each other; there must be some corroboration of the contradictory testimony. Such corroboration, however, may be furnished by evidence *aliunde* tending to show the perjury independently of the declarations of testimony of the accused."

We think that it should be held that a conviction for perjury cannot be sustained merely upon the contradictory sworn statements of the defendant, but the prosecution must prove which of the two statements is false, and must show that statement to be false by other evidence than the contradictory statement. *Billingsley v. State*, 49 Tex. Cr. R. 620 (95 S. W. 520). This case will be found reported in 13 Am. & Eng. Ann. Cas. at page 730, and there is a very full and complete note containing reference to the authorities, both English and American. Many cases are cited, among them *Schwartz v. Commonwealth*, 27 Grat. (Va.) 1025, 21 Am. Rep. 365; *Rhodes v. Commonwealth*, 78 Va. 692.

It seems to us that the trial court should have covered this question with a more explicit charge. The attention of the jury should have been directed to the point whether perjury was committed by the defendant, if at all, on the 7th of April when he testified upon the examination, or whether he had testified mistakenly or untruthfully or falsely on March 24th before the magistrate. We have no doubt that under our statute deliberate and wilful false swearing before the magistrate upon a material matter, before the warrant was issued, and after the complaint had been made, would constitute perjury. We do not hold that the defendant might not have been properly convicted of

perjury in his testimony of the 7th of April, if the jury should find, under proper instructions, that he had testified to the truth before the magistrate on the 24th of March. But to reach that result the evidence should have negated the probability of mistake or duress in regard to the first statement, and the people should have shown which of the two statements was false; or rather, under this information, they should have shown that the last statement was false.

We think that under the testimony of the defendant his claim that his statements made before the magistrate, and other statements in the presence of the other witnesses were not freely made, or that they were induced by threats, duress, and the exercise of what is claimed by the defendant as the "third degree," and were not true in fact, should have been submitted to the jury; and we also think that it was prejudicial error not to have given defendant's first and second requests to charge, or the substance thereof.

As to the claimed admissions or confessions of the defendant, we have recently stated the rule to be that, if the preliminary testimony made it clear either that the statement claimed to have been made was voluntary or involuntary, it is the duty of the trial court to admit or reject it. If the testimony left the question in doubt, it was the duty of the court to admit it, and leave the question to the jury under proper instructions to determine whether it was voluntarily made. *People v. Prestidge*, 182 Mich. 80, 82 (148 N. W. 347). We think that the jury should have been explicitly instructed upon this subject, but the subject was not alluded to in the charge.

2. Was the charge upon the subject of the presumption of innocence sufficient, in view of the refusal to charge as requested on that subject?

We have held that it was not error to refuse specific requests, if the charge as given brings out the same

point clearly and definitely. *People v. Hoek*, 169 Mich. 87 (134 N. W. 1031). But upon this subject see the following cases: *People v. Karamol*, 173 Mich. 354 (139 N. W. 1); *People v. Rogulski*, 181 Mich. 481 (148 N. W. 189); *People v. De Fore*, 64 Mich. 693 (31 N. W. 585, 8 Am. St. Rep. 863). In the last-cited case it was said:

"It is the duty of the trial judge, in a criminal case, to instruct the jury in reference to the presumptions of law applicable to the case before them, distinguishing those which are conclusive from those which are disputable. The presumption of innocence is present in every criminal case; and he should instruct the jury to that effect, and that it stands good until overcome by evidence which convinces the jury beyond a reasonable doubt that the respondent is guilty."

In our opinion the language used by the trial court was not a correct statement of the law. In view of the request to charge, it was not sufficient to say "the man comes into court clothed with the presumption of innocence, and he stands innocent in your minds until the people, through the prosecuting attorney, have convinced you of his guilt beyond a reasonable doubt." It was not the equivalent of stating that the presumption stands good until overcome by *evidence* which convinces the jury beyond a reasonable doubt that the defendant is guilty.

In the particulars above pointed out, we are of the opinion that the trial court erred in its charge to the prejudice of the defendant. The case was one requiring more explicit instructions as to the law governing the crime of perjury, under the exceptional circumstances of the case.

The judgment of the court below is reversed, and a new trial granted.

KUHN, OSTRANDER, BIRD, MOORE, STEERE, and BROOKE, JJ., concurred. PERSON, J., did not sit.

MORRISON v. QUEEN CITY ELECTRIC LIGHT & POWER CO.**1. WATERS AND WATERCOURSES — FLOWING LANDS — ACTION — EVIDENCE.**

In an injunction suit to prohibit defendant from overflowing lands of the complainant, testimony that plaintiff paid \$5,000 for the mill and premises including a claim for damages against the defendant power company would not be proof of the value of the premises when the transfer occurred.

2. SAME—DAMAGES—MINIMIZING INJURY.

The property owner whose lands are damaged by flowing is under the legal obligation to minimize the damage as far as may be and in an action for the injury can recover only the damages that could not be avoided by exercising reasonable precaution.¹

3. SAME—DAMAGES IN CONTEMPLATION OF WRONGDOER.

Where defendant power company flooded the mill property of plaintiff, he was entitled to adequate damages for the injuries sustained and it was not material whether defendant actually contemplated them, as it must be held that all damages naturally and proximately following from its wrong were in the contemplation of the tortfeasor.

4. SAME—DECREE—DAMAGES.

Award of damages of \$235 increased by the court to \$500 and decree modified accordingly.

Appeal from Grand Traverse; Mayne, J. Submitted October 5, 1916. (Docket No. 37.) Decided December 21, 1916.

Bill by Harvey Morrison against the Queen City Electric Light & Power Company for an injunction

¹On duty of riparian proprietor whose rights are interfered with or one whose property is flooded because of the obstruction of a natural watercourse, to minimize the damages, see note in 22 L. R. A. (N. S.) 684.

restraining defendant from flooding complainant's land. From a decree awarding damages, complainant appeals. Modified and affirmed.

John W. Patchin, Parm C. Gilbert, and H. C. Gilbert,
for complainant.

Covell & Cross, for defendant.

STONE, C. J. This case is before this court for the second time. The opinion written by Mr. Justice KUHN, when the case was first here, will be found reported in 181 Mich., at page 624 (148 N. W. 354). As his opinion gives a full and clear statement of the case, it is unnecessary to repeat it here at any length.

Briefly stated, the bill of complaint was filed to restrain the defendant from overflowing certain lands owned by the plaintiff, located on the Boardman river near Traverse City. These lands, it was alleged, were overflowed by reason of the wrongful and unlawful construction of a dam upon said river below the premises of the plaintiff, by the defendant. Plaintiff's premises consist of about $7\frac{1}{2}$ acres of land 40 rods north and south by 30 rods east and west, in the west part of the southeast quarter of the southwest quarter of section 3, township 26 north, range 11 west. The lands had been sold by one Cedersten to James M. Crandall, subject to certain water privileges theretofore granted in 1902 to Ralph Case, Joseph O. Crotser, and Lorraine K. Gibbs, which consisted of the right of certain water flowage and power, and to hold back water and the natural flow of the same for a distance specified in the deed as 40 rods above a highway bridge which crosses the stream at the premises. These water rights were conveyed by Case and those interested with him to the defendant, in April, 1907. In the summer and fall of 1908, the defendant started the construction of a dam, and it was concluded that in

order to make it a profitable enterprise it would be necessary to construct it with a 22-foot head. It was soon discovered, however, that if a dam with a 22-foot head were built it would be necessary to obtain flowage rights additional to those already possessed; and additional rights from certain of the riparian owners were obtained. An attempt was made to obtain such rights from Mr. Crandall, who, at that time, was the owner of the property in question. It was claimed that Mr. Crandall made no objection to the building of the dam, but would not estimate his damages until the dam was completed, and the water raised. The defendant's dam and power house were completed about August 15, 1909.

We think it appears from the record that, while the plaintiff's premises consist of about $7\frac{1}{2}$ acres, only about 4 acres of the same lie upon the east side of the river and are here affected; the portion west of the river being high land.

When the case was first heard in the court below, an injunction was denied; but the right was given to plaintiff to offer further proofs of the damage sustained by him by reason of the construction of defendant's dam and the flooding of the premises; and the right was given to either of the parties to impanel a jury to hear proofs and assess the damage. That decree, upon appeal, was affirmed by this court, but without prejudice to plaintiff to elect, if he so desired, to resort to a court of law rather than to have a jury determine the question of damages in the case. That opinion was handed down July 24, 1914. The case went back to the circuit court, and about one year thereafter, to wit, on July 14, 1915, the case came on to be heard before the trial court, to determine the question of damages which should be paid to the plaintiff by reason of the premises.

The plaintiff did not obtain a deed of these prem-

ises until December 7, 1910, that being the date of the acknowledgment of the deed from Sprague Pratt to him. His deed was recorded December 21, 1910. As early, however, as October 15, 1909, Crandall gave an option to Charles T. Cedersten granting him the right to purchase the property at any time within 60 days for the sum of \$5,000. This option was obtained through Mr. Davis, and on October 16, 1909, the option was assigned to Sprague Pratt, a clerk in Mr. Davis' office. According to the testimony of the plaintiff, this option was obtained for him. Before even the date of the option the plaintiff examined the premises and talked with Mr. Crandall about the condition of the water. He testified that he was informed by Mr. Crandall that he could not run the mill any more, and that he would have to get out, and that Crandall informed him that the water had "put the mill out of business." He further testified that he went over the premises and saw just what the conditions were, and made up his mind that Crandall was right in what he told him about the flooding of the property and the impossibility of running it; that he saw that the water was there over the monuments which had been placed by Crandall, defining the original right of flowage. He further testified that Crandall told him that he had asked to have the water lowered, and it had not been done; that a suit would have to be commenced against defendant, and the water would have to be taken down before the mill could run; that he (Crandall) was fearful of his ability to force the matter through the courts, because he had the impression that his chances of losing were very great in court, and that he would not take it into court himself; that Crandall told him that he (Crandall) had presented the matter to the persons interested in the company and had wanted them to lower the water, and explained to them that he could not run unless it was lowered.

It appears, by stipulation in the original record, that on December 13, 1909, Pratt and Davis gave their demand note for \$5,000, the proceeds of which were deposited in their account and drawn upon on the same date by check for \$5,000 to James M. Crandall; that said note remained in the Traverse City State Bank until February 4, 1911, at which time it was paid by a demand note of the plaintiff for \$4,000 dated February 4, 1911, and that an additional \$1,000 note was given; and that said two notes of the plaintiff had never been renewed and were held by said Traverse City State Bank.

One cannot read the record in this case without becoming satisfied that the plaintiff never purchased the premises intending to operate the mills as a business; that he was employed by the Hannah & Lay Mercantile Company, and had been in such employ for more than 26 years, having charge of the books of account and the work generally of the office of the said company, and he also acted as its credit man; that he had handled some timber and forest products for himself in connection with the business of the company, but that he had never operated a mill himself, or engaged in the business as an operating proposition. We are satisfied that the whole arrangement which placed the title of this property in the plaintiff was manipulated by the officers and those interested in the Boardman River Electric Light & Power Company, a rival corporation, engaged in selling electricity in Traverse City, in competition with the defendant. In his testimony the plaintiff said:

"At the present time, the title to the Crandall mill, and the property where it stands, is in my name. I got the conveyance of that property by seeing Sprague Pratt. * * * I first mentioned the matter of negotiating or arranging to get this property to Mr. Clinch, and then to Mr. Garland."

Mr. Clinch was interested in the Boardman River Electric Light & Power Company, and Mr. Garland was cashier of the bank.

While the plaintiff may be considered as merely a "figurehead," or nominal owner of this property, yet the fact appears that he holds, and has held, the legal title to the property since December, 1910. Under these circumstances, we think he is entitled to such remedy as the law would give him and no more. *Edwards v. Mining Co.*, 38 Mich. 46 (31 Am. Rep. 301). But as the case is here on an appeal from a decree awarding damages to the plaintiff, the evidence must be examined with that end in view. Counsel for the respective parties were so far apart in their claims of what the evidence shows upon the subject of damages, that it became necessary for us to read the entire testimony in both records to enable us intelligently to pass upon that question.

We are satisfied that the premises were not worth the sum of \$5,000 when purchased by the plaintiff; that he bought the same with his eyes open; knew the conditions; and, because he saw fit to purchase these premises and a lawsuit and promised to pay therefor the sum of \$5,000, it does not necessarily follow that the sum which he paid must be taken as the value of the premises in the condition in which they were when he purchased.

Upon the same date that he recorded his deed, plaintiff caused to be served upon the defendant a lengthy written notice requiring it to absolutely desist and refrain from withholding the natural flow of the Boardman river, or to hold back the waters and the natural flow thereof in and to said stream at, and beyond the point located on said stream by the original conveyance from Cedersten by his deed to Case and others in 1902; and defendant was notified and re-

quired by the notice to conform strictly to its flowage rights. This notice was served December 21, 1910. It appears that defendant paid no attention to this notice. Plaintiff had a right to serve this notice and to ask defendant to desist from the further flooding of his premises. It ought to be presumed that any action found to be an invasion of another's rights will be discontinued. This invasion was not discontinued, and the bill in this case was filed February 14, 1911. The testimony to determine the damages, as we have said, was taken before the trial court in the month of July, 1915, nearly five years after this notice had been served upon the defendant.

What damages should this plaintiff recover for this claimed continued invasion of his rights after he became the owner of the property? There is a great conflict in the evidence as to the extent of the flowage and the amount of damages sustained by the plaintiff. We are satisfied that the premises have been damaged in a substantial manner, and that defendant has, without any right, raised the river along the premises of the plaintiff. L. K. Gibbs, one of the promoters of the defendant company, and a man as familiar with the Crandall property as any other witness who appeared in the case, testified as follows:

"We raised it just exactly to where it was showed to him (Crandall) on the start it would come to. We did know, after we got started to build the dam, that it would flood his property some, and it did; but at first we didn't know it. When we came to figure on a 22-foot head, we could realize it; that is when we got the levels correct."

The learned circuit judge, who heard the entire testimony, saw the witnesses, and visited and examined the premises, made a written finding in the case. We cannot better express his views than to here include his findings in the case, which are as follows:

"The only question involved in this case is the amount of damages to be awarded to complainant. Under the pleadings and proof complainant should be placed as nearly as possible in the same position he would have been had the water been raised only to the 40-rod limit.

"Complainant's premises are situate in the Boardman river valley. This valley, at the point in question, is a mile upwards in width and is situated between high lands on either side. Drillings on the premises and the level of the water in the cat-hole in Cedersten's field discolse the fact that the water level is higher in the field and in the holes drilled than in the pond. This somewhat anomalous fact, I think, may be accounted for on the theory that the passage of the water through the earth into Boardman river has been checked or interfered with by the raising of the water in the pond and by the deposit of silt and other matter in the bed of the river and on the sides of the bank below the water level. But, whatever the cause, the fact is established that the raising of the water above the 40-rod limit raised the water level in the cat-hole and on the premises.

"The raising of the water has interfered with complainant's business and has caused him damage. Complainant operated a sawmill and shingle mill upon the premises. These two mills were operated independently, and the business, also, was independent one of the other. It is admitted that the raising of the water did not interfere with the shingle mill or shingle business. It did, however, interfere with the sawmill as conducted by complainant. The sawmill was a cheaply constructed building consisting of frame with roof and part of the sides covered with sheet iron; the greater portion of the sides of the building was open. The machinery was placed upon timbers laid upon the ground. A description of the same appears in the testimony and need not be repeated. In operating the sawmill complainant made use of the sawdust as fuel. In our consideration of the same, we have assumed that complainant had a right to operate his plant as he deemed to his own best advantage. He evidently considered that the use of sawdust as fuel was an advantage.

"The damages should be predicated upon the use of the premises by complainant. Under the testimony the track could be raised and the sawmill operated to the same advantage for about \$100. Some additional grading would have to be done, and we have estimated, under the evidence, that the sawmill could be changed so as to make use of the sawdust at an expense of not to exceed \$125, and under the evidence this would not interfere with the manufacture of lumber nor add to the cost, as the raising of the water in the pond would place the mill and pond in relatively the same position as before.

"The witnesses varied materially upon the question as to whether the raising of the water was an advantage or disadvantage to the premises. Under the evidence, I find the fact to be clear that the value of the premises as a manufacturing proposition, the sawmill being raised as stated, is not affected materially by the raising of the water; the flow of the water from the cat-hole in Cedersten's field being provided for. In the spring of the year and during freshets, necessarily the water from melting snow or heavy rains must pass from Cedersten's field and the high lands adjoining over and across these premises. To accommodate this surface water, nature has provided a small ravine. The levels submitted show that this cat-hole can be readily drained into the river by an underground drain of tile or other material. My recollection is that \$35 was the outside estimate of cost by witnesses as to the expense of this drain. In my opinion, \$50 would be ample to drain this cat-hole. With the drain the water in the cellar of the boarding house would likewise be lowered. This would take care of all the water, also a considerable portion of the surface water in the spring, and in my opinion the premises would be in as good or better condition than before the raising of the water.

"The backing up of the water along the ditch beside the highway would render necessary a culvert or bridge; also, there is a possibility that some of the wagon tracks through the mill yard might require some gravel or other substance in the spring of the year. Although, in my opinion, the drain would make the premises as good as before the raising of the water,

the sum of \$25 may be awarded to construct the culvert or bridge and for the small amount of gravel necessary to improve this track through the millyard.

"Complainant had deposited some sawlogs in the millyard. These logs are practically a total loss. Under the evidence complainant could have removed these logs to another mill at an expense of not to exceed \$1 per thousand feet. Under the law it was his duty to lessen his loss by removing these logs. He will therefore be allowed \$1 per thousand upon the logs, the cost of removal. The proofs show, however, that he might have manufactured these logs into lumber in the mill without any change, merely losing the supposed benefit of the sawdust as fuel.

"In my opinion, the changes in the mill as suggested and the draining of the water herein provided for, which will enable the complainant to make use of the sawdust as fuel, places complainant in the position that he can manufacture logs as cheaply now as before the raising of the water. For this reason, I do not allow any damages for loss of business. There is as much timber available as ever, and complainant can manufacture the same as cheaply as formerly. I therefore assess damages at the sum of \$200, plus \$1 per thousand for lost logs."

By the decree made in pursuance of this finding, the court awarded the plaintiff the sum of \$253 damages for past, present, and future maintaining of the water in the Boardman river at and above the dam of the defendant at a head of 22 feet, and awarded execution therefor, with costs to the plaintiff. The plaintiff has appealed from that decree, and insists that he should recover, not only the original purchase price, but profits lost, both past and future, by reason of the conduct of the defendant.

It appears that the sawmill stood idle nearly all of the time of the pendency of this case. It has received little, if any, care, and naturally appeared to be in a dilapidated condition at the final hearing of this case. The plaintiff never attempted to operate the mill at all.

For some unexplained reason one year elapsed, after the former opinion in this cause went down, before the taking of any testimony upon the subject of damages. In the meantime, the property was deteriorating rapidly. It appears that the machinery in both the shingle and saw mills was secondhand machinery, when placed therein by Crandall; that the shingle mill was the more valuable; and that the latter was not affected by the raising of the water, except as the mill yard was rendered wet by the setting back of the water. It also appeared that the mills were operated independently of each other.

It is the contention of the defendant, and we think such contention is well grounded, that it was the duty of the plaintiff to minimize the damages which had been occasioned by the flooding of the premises, and that, having failed to do so, he can recover only such damages as would not have been avoided by so doing, and our attention is called to the familiar rule announced by this court in the cases of *Cubit v. O'Dett*, 51 Mich. 347 (16 N. W. 679); *Breen v. Hyde*, 130 Mich. 1 (89 N. W. 732); *Talley v. Courter*, 93 Mich. 473 (53 N. W. 621); and other similar cases.

It is also contended, and we think justly, that the plaintiff should have proceeded and made an honest endeavor to reduce the damages by changing and improving the property as suggested by the trial court, in its findings, and the doctrine is invoked: That a party is always entitled to recover the legitimate expenses incurred by him in an honest endeavor to reduce the damages flowing from, or following, a wrongful act. See *Ellis v. Hilton*, 78 Mich. 150 (43 N. W. 1048, 6 L. R. A. 454, 18 Am. St. Rep. 438); 13 Cyc. p. 78, and cases there cited. And, having failed to do so, plaintiff can only recover such damages as could not have been prevented by so doing.

It appears from the testimony that defendant paid

to two other parties, not more seriously affected than the plaintiff, the sum of \$500 each, for flowage rights. The only doubt which we have had in this case is whether the sum awarded by the trial court was adequate to compensate the plaintiff for the damage which it may be said he had suffered since he became the owner of this property. We cannot lose sight of the fact that the defendant committed a tort in flooding the premises of the plaintiff. We think that the damages recovered should compensate for the injury sustained. The court should take a reasonable view of the question, realizing that the amount cannot be estimated with entire certainty, and should award the plaintiff adequate damages for the injury sustained under the circumstances here shown. It is immaterial whether the defendant actually contemplated the damages which resulted or not; it must be held to contemplate all the damages which legitimately follow from its wrongful act, bearing in mind the duty of the plaintiff to minimize his damages as above stated.

A careful examination of the entire record has led us to the conclusion that the amount of damages awarded by the trial court was inadequate. In our opinion, the millyard will, to a large extent, have to be filled in and raised, and much more drainage will have to be supplied than that contemplated by the trial court. We think that the amount of plaintiff's damages should be raised to \$500, in lieu of the sum awarded him by the court below.

The decree will be modified in that respect, and when so modified will stand affirmed, with costs to the plaintiff, in both courts, to be taxed.

KUHN, OSTRANDER, BIRD, MOORE, STEERE, and BROOKE, JJ., concurred. PERSON, J., did not sit.

SCHROETKE v. JACKSON-CHURCH CO.

1. MASTER AND SERVANT—ACCIDENT—PERIL—DEFINITION.

The words peril or accident denote an unexpected occurrence or mishap, taking place without design.

2. SAME—COMPENSATION—NERVE SHOCK.

One who suffers from some shock, or nervous condition, as a result of an untoward incident, or disturbing event, arising in connection with or out of his employment, may recover compensation from the master.

3. SAME—ACCIDENT—NERVE SHOCK.

A watchman, who received a nervous shock from the breaking out of a fire on his employer's premises, resulting in heart failure and death, was within the compensation act and his wife could recover as for an accident; and an order denying the award is reversed and the cause remanded to the accident board.¹

Certiorari to Industrial Accident Board. Submitted October 16, 1916. (Docket No. 146.) Decided December 21, 1916.

Fredericka Schroetke presented her claim against the Jackson-Church Company for compensation for the death of her husband in defendant's employ. From an order denying compensation, petitioner brings certiorari. Reversed and remanded.

R. L. Crane, for appellant.

Keena, Lightner, Oxtoby & Hanley, for appellee.

STONE, C. J. This is certiorari by claimant to review the decision of the Industrial Accident Board. Frederick Schroetke died while in the employment of the respondent, on June 13, 1913. Respondent was

¹As to application and effect of workmen's compensation acts, generally, see comprehensive note in L. R. A. 1916A, 23.

under the workmen's compensation law (2 Comp. Laws 1915, § 5423 *et seq.*). The claimant is the widow of deceased. The deceased was about 72 years of age. He had been for 15 years continuously in the employ of the respondent as night watchman at its foundry and shops in Saginaw, and among his other duties he was to watch for accidental fires in said foundry and shops during the night, and, in the event of one breaking out, to extinguish it, if possible, and spread an alarm for aid to extinguish and control it. On the date in question deceased had spent the day at home, about eight blocks from respondent's plant, and about 5 o'clock in the afternoon left his home in usual health to take up his work at 6 o'clock in the evening. He walked to the foundry. A few minutes after beginning his work at said foundry and shops a fire broke out, and deceased attempted to extinguish it, and spread an alarm thereof, and as a result of his efforts to give the alarm of the fire and attendant excitement he died of heart failure, the death being hastened and caused, in whole or in part, thereby. He died in said foundry immediately after the arrival of the fire department. Compensation was denied by the committee of arbitration and this decision was affirmed by the full board.

The testimony taken before the committee of arbitration is all contained in the record, and it may be said that the evidence is undisputed. Immediately after the death of Mr. Schroetke, and while the body was still lying in the building, Dr. W. F. Morse was called to the plant and examined the body. He testified that he saw no signs of external marks upon the body, and that from the examination he was of the opinion that Mr. Schroetke died from heart trouble; that the witness had treated the deceased some three or four years before; that at that time deceased was suffering from stomach trouble, and he had an irregu-

lar heart action; that he might have died from *angina pectoris*; that he did not disclose to Mr. Schroetke the condition of his heart when he treated him. The following testimony was given in answer to questions of the committee:

"Q. In case a man has a weak heart, would excitement and overexertion have a tendency to precipitate stoppage of the heart and death?

"A. I would say it would.

"Q. So if this man Schroetke had a weak heart, heart trouble, and was engaged as watchman in the plant of the Jackson-Church Company and discovered a fire, and exerted himself somewhat in giving the alarm, what would you say as to the probable effect of the excitement and overexertion?

"A. Why any undue and overexcitement might affect the heart.

"Q. What would you say as to the exertion?

"A. Of course, that aided.

"Q. The quick movements the man probably would make in a case fire breaking out?

"A. I think the action through the excitement and the shock would cause the heart, possibly, to cease to beat.

"*Respondent's Counsel*: Q. Ordinarily speaking of a man who was suffering from heart trouble, or any other condition such as to give any such effect, that almost anything might cause his death?

"A. I would say that any little shock or excitement might bring it on.

"Q. In other words, if I understand you correctly, the condition of his heart had been running such a length of time that almost anything which would be a shock or some undue excitement would cause his sudden demise?

"A. Yes.

"*A Member of the Committee*: Q. You don't want to say any little thing would affect his heart?

"A. I think any shock, excitement of any kind, would bring on the same condition of things; any excitement would bring on heart failure.

"Q. That is, if the heart was in a certain condition?

"A. Yes; if the heart was a weak heart.

"Q. Is there anything else, Doctor, that might have caused his death excepting heart failure and heart trouble?

"A. I think he died from heart trouble."

Error is assigned on the action of the board in refusing to award compensation to claimant, when, as is claimed, the testimony and conceded facts show there was an accidental, personal injury to deceased resulting in death.

The answer of the Industrial Accident Board to the writ of certiorari, in referring to the hearing before that board, contains the following language:

"At the inception of the hearing claimant's attorney stated:

"As I understand, the facts in this case are not in dispute. The position of the defendant is no liability, because the death resulted from heart failure while deceased was in the performance of his duty as watchman for respondent. The cause of death arose from and grew out of the discharge of the employee's duties to defendant, and death resulted from an affected heart and overexertion and excitement in the discharge of his duty. If these are not the facts, and respondent takes different position, I desire to produce further testimony in the cause."

"*Mr. Kinnane*: I so understand the facts. We certify and return that deceased was employed as watchman in respondent's plant at Saginaw at the time of death and for 15 years just prior. Among his duties he was required to watch for fires in the plant, and in event of one breaking out to extinguish it and spread alarm for aid. He began his labors about 5:30 p. m., and continued till 6 a. m., each night. He spent the day prior to his death with his family apparently enjoying good health and went to his work eight blocks from home at 5 p. m. He discovered a fire at 6 p. m. in defendant's plant, and immediately spread alarm by blowing the whistle. The president of the company went from the office near by into the plant and told him not to blow the whistle longer, as he would telephone the fire department. In a few minutes deceased began sounding the whistle again, and

the president went to him and said, 'I have phoned the fire department, and don't blow the whistle any more, but close the factory doors and keep the crowd out.' A strike was on at the factory. Directly the fire department arrived and proceeded to place the hose to extinguish the fire. Deceased said something to one of the firemen concerning directing the stream on another part of building. The president of the company observed deceased was pale and started to fall. His knees began to waver. In a few minutes he dropped to his knees, fell over, and died almost instantly. Dr. Morse, the physician who had previously treated the deceased, was called and examined the body, and gave testimony at the hearing as to the condition found and his opinion as to the cause of death, said testimony being correctly set forth in the petition in this case.

"The plant of the defendant is a large one covering the block, and the deceased was the only watchman. The deceased showed much zeal in giving the alarm of fire and to protect his employer's property, and was excited. He was afflicted with heart ailment, and his death was due to heart failure caused by the diseased condition of his heart and the excitement and exertion incident to the fire. He received no physical injury in the sense that he was not struck by anything, did not fall, or receive any blow, concussion or physical impact.

"(2) The proceedings at the hearing before the committee on arbitration and the evidence in said cause are correctly set forth in the petition attached to and made a part of this return, except that the following should be added: "The fire was a small one, and was in a shed adjoining one of the factory buildings. The total loss was about \$600 principally arising out of injury to the motors belonging to the company."

"(3) The arbitrators found claimant was not entitled to compensation under Act No. 10, Extra Session 1912 (2 Comp. Laws 1915, § 5423 *et seq.*). Claimant duly appealed to this board, but upon its suggestion the appeal rested until a similar case then before the board should be disposed of, but, that case not coming to decision, the instant case was in proper time and manner presented for decision. This board on April

20, 1916, presented that under the facts the law as provided in said Act No. 10 of 1912 did not permit claimant to recover, and the decision of the arbitrators was affirmed.

"Conclusion of Law.

"The holding of the board as a matter of law in this case was that the excitement and exertion, unaccompanied by any immediate physical injury, did not constitute an accident for which compensation could be awarded, within the meaning of the Michigan workmen's compensation law."

The evidence in the case being undisputed, we think the record fairly raises the question whether the conclusion of law reached by the Industrial Accident Board was justified by the facts found. We think this case fairly presents the question whether compensation can be recovered where death or disability results from overexertion and excitement caused by an accidental fire such as broke out in this case, where the deceased was afflicted with heart ailment, and where death was due to heart failure caused by deceased's condition of the heart and the excitement and exertion incident to the fire. It is the claim of the claimant that the case is governed and controlled by our own decisions, and especially by *La Veck v. Parke, Davis & Co.*, 190 Mich. 604 (157 N. W. 72 L. R. A. 1916D, 1277).

In our opinion the instant case is a stronger case in favor of awarding compensation than the *La Veck Case*. In the instant case, by the undisputed evidence, the exertion and excitement occasioned by this accidental fire produced a nervous shock and increased the heart action of the deceased and caused his death. May this be said to have been an accidental death within the meaning of our act? This portion of our act was borrowed from the English act, and it early became necessary to determine what was personal in-

jury or death by accident, and to give a definition of the word "accident" in the English courts.

In *Hensey v. White* (1900), 1 Q. B. Div. 481, the language of an earlier case was approved, where it was said:

"I think the idea of something fortuitous and unexpected is involved in both words 'peril' or 'accident.'"

In *Fenton v. Thorley & Co.*, 72 L. J. K. B. Div. (N. S.) 790, it was said:

"The expression 'accident' is used in the popular and ordinary sense of the word as denoting an unlooked for mishap, or an untoward event which is not expected or designed."

In the case of *Yates v. South Kirby, etc., Collieries, Ltd.*, in the court of appeal, England, reported in 3 B. W. C. C. at page 418, Yates, a collier, assisted to remove a fellow workman who had been knocked down and so shockingly injured by a fall of coal that he died almost immediately. This gave Yates such a nervous shock that he became neurasthenic, and, although he made some attempts to resume work, he was unable to do so. On an application for compensation the judge found that his incapacity was genuine, and that it was caused by what he had seen and done in the course of his employment. On these findings he held that the neurasthenia was due to personal injury by accident, and awarded compensation. This decision was held to be right. The trial judge in that case found as follows:

"The applicant picked him (Haggas) up in his arms, and with assistance carried him away. He was not dead at the time, but died in a quarter of an hour. The effect on the applicant was such that he sustained a nervous shock which incapacitated him from working at the coal face. * * * I find as a fact that there was a genuine incapacity to work which was due to the nervous shock which he sustained on the

9th October. It clearly was his duty to his employers to go to the assistance of the injured collier who shouted for help from the next working place, and his doing so arose both in the course of and out of his employment."

He found the cause of injury was nervous shock, and that that was a case within the act. The appellate court judge in disposing of the case, said:

"In my opinion on that finding of fact, it is impossible for us to say that the learned county court judge was wrong in law. * * * I think the decisions of this court, including the recent decision in the case of *Eaves v. Blaenclydach Colliery Co.*, 2 B. W. C. C. 329, do show that when a man in the course of his employment goes to a place and sustains a nervous shock producing physiological injury, not a mere transient emotional impulse, it is an accident arising out of and in the course of his employment. It is something unexpected, no doubt, in this sense, that I do not suppose the man thought for a moment, or knew when he was doing what was plainly his duty in going to the rescue of the other party, that it would have this physiological effect on his system. * * * I think this is a case which falls within the act of Parliament on the same principle and in the same way as if the man on going to the rescue of the other collier was injured by this fall or had stumbled or fallen on his way there. That, undoubtedly, would have been a case within the act, and I can see no real difference in principle (when once you get rid of malingering) between that case and a case where a physiological injury—physiological damage—is produced by reason of what happened to this man when he went in the course of his duty to the neighboring stall, and saw what had happened to this workman. In my opinion, the learned county court judge was right."

In *Clover, Clayton & Co. v. Hughes*, 3 B. W. C. C. 275, a workman suffering from an advanced aneurism of the aorta was doing his work in the ordinary way by tightening a nut with a spanner. This ordinary strain caused a rupture of the aneurism, resulting in

death. The county court judge, on conflicting evidence, found that the workman's death resulted from a personal injury by accident within the meaning of the English act. In the House of Lords it was held that there was evidence on which the county court judge was justified in so deciding. In the discussion of that case Lord Macnaghten said:

"In the argument in *Fenton v. Thorley, supra*, many decided cases were cited in which the word 'accident' was considered. There is one which was cited in the argument and not noticed in the judgment, which is, I think, a very good example of the far-reaching application of the word. I may perhaps be permitted to refer to it. It is not the less instructive because it occurred before the workmen's compensation act of 1897. The case was this: The railway company had established a system of insurance for the benefit of their servants who contributed to it. One of their servants—a signalman in his signal box—saw a train coming, and noticed that there was something wrong with one of the carriages. He was much alarmed, and waved his flag frantically. The engine driver saw the signal, the train was stopped, and an imminent disaster was averted. But the signalman was so horrified that he lost his nerve and was incapacitated for work. Was that an accident? The condition of the insurance was 'against all accidents, however caused, occurring to the insured in the fair and ordinary discharge of his duty.' The court of appeal, consisting of Lord Esher and Kay and A. L. Smith, LL. J., held unanimously that the plaintiff had been incapacitated by accident within the meaning of the policy. "The sole question," said A. L. Smith, L. J., 'is whether the facts which have been proved constitute an injury to the assured by an accident within the meaning of the policy. * * * This is not a case in which, as it has been suggested, the plaintiff has only suffered mental pain or grief. If that had been so, it would not have been within the policy; but this is a case in which he has been subjected to such a shock to his nerves that he has become physically prostrated and put out of employment for months. The company has under-

taken to pay to the assured the weekly allowance of one pound in case of his being incapacitated for employment by reason of an accident, however caused. That I read to mean any unforeseen circumstance, however caused, occurring to him in the discharge of his duty in the company's service. * * * It may be that this sort of accident was not thought of when the policy was framed, for it is of rare occurrence, but that does not prevent its coming within the terms of the policy.' *Pugh v. Railway Co.* (1896), 2 Q. B. Div. 248. Now, in the present case, I have no doubt that there was an accident in the proper sense of the word. The man ruptured an aneurism in his aorta. An aneurism, as I understand, is an unnatural or abnormal dilation of an artery; but still it is a part of the artery, and so a part of the man's body. The man 'broke part of his body,' to borrow Lord Robertson's expression in *Brintons v. Turvey*, 7 W. C. C. 1."

In the instant case the whole circumstance, including the fire, the overexertion and the excitement of the deceased, may be said to have been an accident. It was certainly a fortuitous circumstance. The fact that the man's condition predisposed him to such an accident or stroke must be, under the authorities, held to be immaterial. While the exertion and excitement which accelerated the heart action were not the sole, proximate cause of the death, they were certainly concurring causes. *Rayner v. Furniture Co.*, 180 Mich. 168 (146 N. W. 665, L. R. A. 1916A, 22, Am. & Eng. Ann. Cas. 1916A, 386.

Counsel for claimant have cited two Massachusetts cases, *McNicol's Case*, 215 Mass. 497 (102 N. E. 697, L. R. A. 1916A, 306), and *Brightman's Case*, 220 Mass. 17 (107 N. E. 527, L. R. A. 1916A, 321). In the last-cited case it was held that acceleration of previously existing heart disease to the mortal end sooner than otherwise it would have come is an injury within the

meaning of the workmen's compensation act. We do not cite these cases as authorities under our compensation act.

In *Adams v. Color Works*, 182 Mich. 157, at pages 168, 169, and 170 (148 N. W. 485, L. R. A. 1916A, 283, Am. & Eng. Ann. Cas. 1916D, 689), we pointed out the distinction between the Massachusetts act and the Michigan act. This distinction is recognized by the Massachusetts court in *Re Madden*, 222 Mass. 487 (111 N. E. 379, L. R. A. 1916D, 1000), where the court says:

"The standard established in this respect by our workmen's compensation act as the ground for compensation is simply the receiving of 'personal injury arising out of and in the course of' the employment. This standard is materially different from that of the English act and of the acts of some of the States of this nation. That standard is 'personal injury by accident,' both in the act of 1897 and 1906."

A perusal of this case will show the distinction we have suggested. We think, however, that under the English cases, and under *La Veck v. Parke, Davis & Co.*, *supra*, it must be held that the death of claimant's decedent, under the circumstances disclosed by the undisputed evidence, entitled claimant to compensation, and that the conclusion of law reached by the Industrial Accident Board was erroneous.

In *Bryant v. Fissell*, 84 N. J. Law, 72 (86 Atl. 458), it was held that the question whether or not an injury is an "accident" within the purview of the New Jersey act is a mixed question of law and fact, and that when applied to certain facts it is a question of law.

On the part of the respondent it is contended that in the instant case claimant's intestate did not suffer any injury, and therefore that no injury caused his death, that it would be more correct to say that death occurred during the hours of service, and that under

the authorities in this State there is no liability shown, and *Nelson v. Crawford*, 122 Mich. 466 (81 N. W. 335, 80 Am. St. Rep. 577), is cited. We do not think that this case is applicable to a claim under this act.

We have examined the cases cited by respondent's counsel in which no liability was held. They are the following:

O'Hara v. Hayes, 3 B. W. C. C. 586. In that case a workman who had been suffering for some years from progressive heart disease died while hurrying to the railway station with a parcel weighing 17 pounds, and it was held that the death was attributable to the disease and not to an accident. The appellate court in that case said:

"This man died while he was doing his normal work. There was nothing sudden. His death was not unexpected."

The next case cited is that of *Kerr v. Ritchies*, 6 B. W. C. C. 419. There a workman, apparently in good health, died suddenly from heart failure while at work lifting baskets filled with corn. The sheriff-substitute found:

"That nothing unusual or unexpected occurred in the course of his work that afternoon, until the sudden attack of illness, and that the strain arising from the exertion made by the deceased in repeatedly lifting the baskets was a contributing cause of the heart failure."

He found that death was due to accident. The appellate court reversed this decision, and held that nowhere was there found any particular event or occurrence to which death could be attributed, and it was held that there was no liability.

The next case cited is that of *Black v. Shipping Co.*, 6 B. W. C. C. 720. In that case an officer was superintending loading a ship for several days. The work

was practically continuous day and night and very hard. Six days after the ship left port the officer died of heart failure. There was medical evidence that the death was due to heart failure caused by the continuous strain of work. The county court judge found that there was no evidence of accident and the appellate court affirmed that action, holding that there was no evidence of accident within the meaning of the act.

We think that these three cases are all readily distinguished from the instant case. Our conclusion is that the finding of the Industrial Accident Board in its conclusion of law was erroneous, and must be reversed.

Under the practice, as stated in *Andrejewski v. Coal Co.*, 182 Mich. 298 (148 N. W. 684, Am. & Eng. Ann. Cas. 1916D, 724), and *Finn v. Railway*, 190 Mich. 112 (155 N. W. 721, L. R. A. 1916C, 1142), and *Carpenter v. Forging Co.*, 191 Mich. 45 (157 N. W. 374), the order of the State Industrial Accident Board is reversed, and the case remanded for further proceedings in accordance with this opinion.

KUHN, OSTRANDER, BIRD, MOORE, STEERE, and BROOKE, JJ., concurred. PERSON, J., did not sit.

BONER v. EASTERN MICHIGAN POWER CO.

1. MASTER AND SERVANT—EXISTENCE OF RELATION—DINNER HOUR
—DEFECTIVE INSTRUMENTALITY—LADDER.

Where plaintiff was doing construction work about the plant of the Au Sable Electric Company, and was employed by defendant power company, he was not engaged in duties incident to his employment at the noon dinner hour, when he had no property or particular service of the master in charge, and had taken his dinner pail and started to climb a ladder to eat his lunch upon the boilers. The breaking of the ladder was not such an accident resulting from defendant's negligence as would render it liable to a workman after he had ceased his employment to seek a place for the said purpose.¹

2. SAME—CESSATION OF EMPLOYMENT—ELECTRICITY.

Though the injured party remained upon the premises where he was employed, the relation of master and servant did not continue, as he was at liberty to go wherever or do whatever he pleased.

3. SAME—DIRECTING VERDICT—LICENSE—DUTY TO LICENSEE.

The injured party was a mere licensee as to the company that had allowed him in its plant, and, as to his employer, there was no ground upon which he could recover against it, unless the possession of the construction company was such that its control, and that of the power company which owned the plant, could be said to be joint.

4. SAME—SUBMITTING CASE TO JURY.

Plaintiff could not rightly recover against either defendants above mentioned on the theory that the relationship of master and servant existed at the time, but the court should have submitted the issue to the jury whether or not a duty was owing to plaintiff as a licensee, by either of the defendants.

¹The question as to whether relationship of master and servant still exists where servant goes upon master's premises before, after or between hours of actual labor, is discussed in notes in 12 L. R. A. (N. S.) 853; 23 L. R. A. (N. S.) 954; 49 L. R. A. (N. S.) 162.

5. SAME—EVIDENCE.

Evidence by another servant that he notified the assistant superintendent of the power company that the rung of the ladder was loose and would turn, charged the other defendants with no duty. He was in no way connected with them. There was no evidence of notice which would charge them.

Error to Jackson; Parkinson, J. Submitted October 10, 1916. (Docket No. 91.) Decided December 21, 1916. Rehearing denied September 27, 1917.

Case by Edwin Boner against the Eastern Michigan Power Company, the Au Sable Electric Company, and the Grand Rapids-Muskegon Power Company for personal injuries. Judgment for plaintiff against the two first-named defendants who bring error. Reversed.

Bernard J. Onen (*Wilson & Cobb*, of counsel), for appellants.

Price & Whiting, for appellee.

STONE, C. J. This is an action on the case, brought by the plaintiff against the Grand Rapids-Muskegon Power Company, the Au Sable Electric Company, and the Eastern Michigan Power Company, to recover damages for injuries sustained by him in a power plant in the city of Grand Rapids, on February 7, 1912. The plant in which the plaintiff was injured was owned by the Grand Rapids-Muskegon Power Company. It is claimed that the plant was in possession of and operated by the Au Sable Electric Company. The Eastern Michigan Power Company was doing certain construction work in and about said plant. The plaintiff was an employee of the Eastern Michigan Power Company, but not of the other defendants.

The trial court directed a verdict in favor of the Grand Rapids-Muskegon Power Company, and submitted the case to the jury as to the other defendants.

The jury rendered a verdict in favor of the plaintiff for \$2,258 against both of the remaining defendants, upon which a judgment was thereafter entered.

The plant in which the plaintiff was injured was in operation at the time. There were eight boilers in the boiler room, four of which had been there for some time, and four had been put in during the summer prior to plaintiff's injury. They were large boilers. Plaintiff testified that a person who desired to go on top of them would be obliged to go up a ladder somewhere from 20 to 25 feet. The room in which the boilers were located consisted of only one story. One of the means provided for reaching the top of the boilers was an iron ladder fastened to, and parallel with, the west wall of the building, and about 4 or 5 inches therefrom, and extending to a height of about 25 feet. This ladder was constructed of iron, the sides being flat pieces of iron and the rungs consisting of hollow pieces of pipe through which long bolts were run and fastened to the sides of the ladder on either side by nuts, which, when tightened, held the side pieces against the rungs so that they would not turn. The ladder was fastened to the wall with bolts or lag screws, and was located about 4 or 5 feet from the boiler nearest the west wall. The ladder in question had been up for six weeks or two months before the plaintiff was hurt.

The plaintiff alleged in his declaration, and was permitted to show by himself and other witnesses, that the employees were accustomed, and had been for some time, to go up on top of the boilers for the purpose of eating their dinners. On the day that the plaintiff was injured, and for two or three days prior thereto, he had been working on the outside of the building, and not upon the top of the boilers. It was cold weather at the time and he was dressed in working clothes and wore leather faced mittens, sometimes by him

called "mitts," upon his hands. At the time the plaintiff was hurt he was going up the ladder referred to for the purpose of eating his dinner on top of the boilers. He was hurt about half past 11 o'clock a. m. He testified that his hours for work commenced at 6:30 o'clock in the morning and continued until 11:30 o'clock when he ate his dinner, and after dinner he went to work at 12 o'clock and continued until 5 o'clock p. m. The wages which he received for his work were paid at the rate of 25 cents an hour. The record shows that no witness was present at the time plaintiff was injured. He testified that he started up this ladder with mittens on his hands and his dinner pail in his left hand. He couldn't state whether he had the bail of the pail in his left hand or on his arm, and couldn't recollect how he did hold it. He claimed to have had hold of the rung with his right hand and his dinner pail in the other, and that, when he took hold of the rung to pull himself up, the rung turned and broke his hold, and he fell to the floor 15 or 16 feet, and was severely injured. He testified:

"Well, I was going up that day and I got about 15 or 16 feet up the ladder and as I grasped the round with my right hand and went to raise myself to the other step, the round rolled and I fell over backwards. I couldn't catch myself with the other hand. I fell on the floor and injured myself, broke my arm and my wrist, and put it out of place, and injured my shoulder."

On cross-examination the plaintiff testified:

"No, I couldn't get as good a grasp on the round with the hand with the mitten on as I could if I had been barehanded.

"The Court: What were those mittens made of, cloth mittens?

"A. I think it was a cloth mitten with leather face.

"Q. If your hand had been warm, Mr. Boner, and you had used your bare hand in going up that ladder

you could have put your hand around the round couldn't you?

"A. I could have put my hand around the round.

"Q. If you would put your hand around the round, even if it turned it couldn't break your hold, could it?

"A. No, not if I had grasped clear round the round, but any one climbing a ladder doesn't stop to place the hand around each round in just such a position it can't turn.

"*The Court*: Had any of those rounds ever turned or indicated they were loose when you had previously used them?

"A. I don't remember of that round being loose before.

"Q. Any of the rounds up there?

"A. None of the rounds.

"Q. The last time before this was the day before you had used it?

"A. Yes, sir.

"*Defendants' Counsel*: Mr. Boner, if I understand it, you had been up and down that ladder repeatedly, and the last time, the day before this accident, with perfect safety?

"A. I had been up there, and always went up and down safe all right.

"Q. You had repeatedly used that ladder, and the last time the day before the accident, and had never discovered a loose round in the ladder?

"A. I had never noticed the round being loose.

"*The Court*: Had you ever gone up there with those same mittens on?

"A. I had not."

He testified that he had gone up the ladder each day for two weeks prior to the time that he was injured, and he didn't remember of any rung in the ladder being loose when he had previously used it. He testified, however, that he might have seen that it was loose and still not thought of it, because the ladder could have been climbed all right if the rung were loose.

All of the other witnesses sworn upon the trial of the case who had used this ladder, except the witness

William Boner, never discovered any loose rung in the ladder until after the plaintiff's accident. The witness William Boner, brother of plaintiff, testified that the rung in the ladder was loose when it was installed, and that he had informed one Mr. Hottinger, the assistant superintendent of the defendant Eastern Michigan Power Company, of that fact. This testimony was denied by Mr. Hottinger, but the question became one of fact and was submitted to the jury.

The room in which the boilers were located was a large one, and the boilers were set through the center of the building, leaving a space in front and in back of the boilers about 15 feet in width and 40 feet in length. In this space there were benches used by the pipe fitters, and the employees were accustomed to gather around these benches at noon for the purpose of eating their dinners.

The plaintiff claimed that the defendants were negligent:

"(a) In failing to furnish plaintiff a safe place in which to work, or to keep the premises in a reasonably safe condition, or to use reasonable care and diligence in the construction of said ladder in order that the same might be reasonably safe for plaintiff and other employees to make use of in passing up and down, to and from the top of said boilers.

"(b) In failing to use due diligence in inspecting and looking after said ladder to see that the same was kept in a reasonably safe condition of repair.

"(c) In placing said ladder in position, leaving one of the rounds loose and the bolt that ran through same not securely drawn up and tightened, so as to prevent the said round from rolling and turning over.

"(d) In allowing the said round in said ladder to be and remain in that condition for a considerable length of time, to wit, for a number of weeks prior to the happening of the accident to the plaintiff."

The case has been brought here upon writ of error by the defendants, the Eastern Michigan Power Com-

pany and Au Sable Electric Company, and there are many assignments of error. We shall not discuss many of the assignments of error, for the reason that, in our opinion, there are two or three controlling questions in the case which are sufficiently raised by the assignments of error. The following is the allegation in plaintiff's declaration:

"And plaintiff further avers that on the said 7th day of February, 1912, he was climbing up said ladder, with due care and diligence, to go on top of said boiler for the purpose of eating his dinner."

And in support of this allegation he testified as follows:

"Q. On this day in question just what were you doing when you got hurt?

"A. I was going up the ladder.

"Q. For what purpose?

"A. To eat my dinner.

"Q. What time of day was it?

"A. Half past 11."

It is the claim of the plaintiff that at the time of the injury he was in the employ of the defendant Eastern Michigan Power Company. There is no claim on his part that he sustained any contractual relations with the defendant Au Sable Electric Company. The testimony of the plaintiff is uncontradicted that he had fixed hours of work, and that his wages were paid by the hour.

We have examined the record with care, and are satisfied that it appears unquestioned that at the time the plaintiff was injured he was performing none of the duties of his employment, but was consulting his own convenience in seeking a place to eat his dinner. In our opinion, under the authorities, the relation of master and servant did not exist at the time of this injury between the plaintiff and the Eastern Michigan Power Company; he was acting on this occasion of his

own volition, and, in our opinion, the rule that where a servant sustains injuries while attempting, without authority, to do something not within the scope of his employment, he cannot recover under the circumstances as disclosed in this case. It cannot be said that he was in said defendant's employment or in the proper discharge of his duty, and he voluntarily sought this place of his own motion. We think this view is supported by the following authorities: *Schwager v. Glass Co.*, 179 Mich. 360-367 (146 N. W. 171); *Moronen v. McDonnell*, 177 Mich. 691-697 (143 N. W. 8); *Spooner v. Detroit Saturday Night Co.*, 187 Mich. 125 (153 N. W. 657, L. R. A. 1916A, 17); *Hutchinson v. Iron Co.*, 141 Mich. 346 (104 N. W. 698).

In 4 Thompson on Negligence, § 3748, it is said:

"As a general statement of doctrine, it may be said that to render a master liable as such for an injury resulting from a breach of his duties to his servant, it must appear that the injured servant was at the time of the injury acting within the scope of his employment. A larger statement of the same principle is to say that in order to hold a master liable for personal injuries to a servant, it must appear that the servant was at the time of the injury engaged in the service of the master, or going to, or from such service, and not acting for some purpose of his own, or going into some place where it was not proper or necessary that he should have been."

See, also, 26 Cyc. p. 1241; *Ellsworth v. Metheney*, 104 Fed. 119 (44 C. C. A. 484, 51 L. R. A. 389), and cases there cited; *Mitchell-Tranter Co. v. Ehmett* (Ky.), 65 S. W. 835 (55 L. R. A. 710); *Dickinson v. Railway Co.*, 177 Mass. 365 (59 N. E. 60, 52 L. R. A. 326, 83 Am. St. Rep. 289); *Wilson v. Railway Co.*, 130 Ky. 182 (113 S. W. 101).

It has been sometimes said that if the injured party remains upon the premises the relation of master and servant continues, but that alone is not sufficient.

Where the injured party, as here, was at liberty to go wherever and do whatever he pleased, and was not in charge of any of his employer's property, nor under his orders, the employee is for that time dismissed from the service. *Baldwin Personal Injuries* (2d Ed.), § 374.

The cases of *Broderick v. Depot Co.*, 56 Mich. 261 (22 N. W. 802, 56 Am. Rep. 382), and *Adams v. Iron Cliffs Co.*, 78 Mich. 271 (44 N. W. 270, 18 Am. St. Rep. 441), cited by plaintiff, are readily distinguished from the instant case, for in the *Broderick Case* at the time the plaintiff was injured he was actually performing a service for the defendant. In the *Adams Case* the employee's duties were numerous, and he had other men under his charge, and if at any time while he was on defendant's premises any need of his services had arisen, it was his duty, under his employment, to have at once stopped and given such services.

In the instant case the plaintiff had fixed hours, fixed wages paid by the hour, and, so far as the record shows, was not required to perform any service until he had eaten his dinner and had returned to his work. As we have already said, there is no claim on the part of the plaintiff that he was in the employ of the defendant Au Sable Electric Company.

The evidence is quite indefinite as to the exact time when the plant had been turned over by the defendant Eastern Michigan Power Company to the defendant Au Sable Electric Company, or whether or not it had been fully turned over at any time. It may possibly be said, although the evidence upon the subject is not clear, that there was a joint possession of the plant by both defendants. It is therefore clear to us that the plaintiff cannot recover in this case upon the theory that at the time of his injury the relation of master and servant existed as between him and either of the

defendants. In our opinion the plaintiff was a mere licensee at the time of his injury.

The court, among other things, charged the jury as follows:

"If you do not believe the evidence as to the round being loose, at the time the ladder was put up, then there is no evidence in the case as to how or when it became loose, and therefore there is no evidence whereby you can find negligence on the part of either defendant, and your verdict in that event would be for the defendants."

The jury, having rendered a verdict in favor of the plaintiff, against both defendants, must have based the same upon the testimony of the witness William Boner. The plaintiff being a mere licensee, there can be no liability on the part of the defendant Eastern Michigan Power Company unless it still had some control over said plant and premises. As we have shown, there was some testimony on the part of William Boner that the rung was loose at the time the ladder was put up, and that he notified Mr. Hottinger of that fact. Mr. Hottinger was the assistant superintendent of the Eastern Michigan Power Company, and had been in the employ of that defendant for a period of three years. He sustained no relation with the Au Sable Electric Company. Any notice to him would have been no notice to that company. There is no evidence in the record that notice of any defect in the ladder had been brought home to the defendant Au Sable Electric Company. The duty which these defendants owed to the licensee was fully discussed by us in the case of *Morrison v. Carpenter*, 179 Mich. 207, at page 216 (146 N. W. 106, Am. & Eng. Ann. Cas. 1915D, 319 *et seq.*). We there referred to the case of *Habina v. Electric Co.*, 150 Mich. 41 (113 N. W. 586, 13 L. R. A. (N. S.) 1126), and that of *Fellon v. Aubrey*, 74 Fed. 350 (20 C. C. A. 436), and a large

number of other cases. See, also, *Murch Bros. Construction Co. v. Johnson*, 203 Fed. 1 (121 C. C. A. 353); *Ellsworth v. Metheney*, *supra*.

In our opinion this case should have been submitted to the jury upon the theory that if there was any liability on the part of either of these defendants to the plaintiff, it was because of the duty owed to him as a licensee. Without evidence of notice or knowledge on the part of the defendant Au Sable Electric Company of a defect in this ladder, which had been purchased of reputable manufacturers and placed in position by the other defendant, there could be no recovery as to the defendant Au Sable Electric Company. And unless the defendant Eastern Michigan Power Company was still so far in control of the plant as that its possession might be considered a joint one with that of the defendant Au Sable Electric Company, there could, in our opinion, be no recovery against that defendant. Neither defendant can be said to have "laid a trap" for the plaintiff unless said defendant was in charge of the plant, and knew of the condition of the ladder.

The case having been submitted to the jury upon an entirely different theory, we think the verdict cannot be sustained as against either defendant. The judgment of the court below is therefore reversed and a new trial granted, with costs to the appellants.

KUHN, OSTRANDER, MOORE, STEERE, and BROOKE, JJ., concurred. BIRD and PERSON, JJ., did not sit.

SCHMIDT v. STEINBACH.

SCHMIDT v. SCHENK.

1. FRAUDULENT CONVEYANCES—CONTRACTS—CONSIDERATION—TRUST.

A contract to care for the mother of the grantor in a deed, undertaken and in part carried out by the promisor, was sufficient to support a conveyance from one brother to another of the interest of the former in his deceased father's estate, as against creditors of the transferror. It was not such an agreement as would create a trust or secret agreement that could be attacked by said creditors.

2. SAME—BILL TO QUIET TITLE—PARTIES.

And the grantee was not entitled, until he had completed his contract, to assert his rights by the commencement of a suit to clear his title against creditors that had levied execution on the legal title of the debtor.

3. SAME—VENDOR AND PURCHASER.

In such a case the legal title remained in the grantor subject to the contract right of the brother and was liable to execution sale.

4. SAME—NOTICE OF LEVY—STATUTES.

The levy is by statute given priority over all prior grantees, mortgagees and others of whose claims the judgment creditor shall not have actual or constructive notice. And occupancy sufficiently puts the levying creditor on such notice. Act No. 227, Pub. Acts 1889, 3 Comp. Laws 1915, § 12898.

Appeal from Washtenaw; Kinne, J. Submitted October 9, 1916. (Docket Nos. 74, 75.) Decided December 21, 1916.

Separate bills by George A. Schmidt against Jacob Steinbach and William P. Schenk to remove clouds upon the title to land. From a decree dismissing the bills, complainant appeals. Affirmed.

A. F. Freeman (*B. M. Thompson*, of counsel), for complainant.

Stivers & Kalmbach (*Roscoe O. Bonisteel*, of counsel), for defendant Steinbach.

Otto E. Haab, for defendant Schenk.

STONE, C. J. These cases were heard and considered together, the evidence applying to both cases, in so far as applicable. The bills of complaint were filed to remove clouds upon the title of the plaintiff in and to the east half of the southeast quarter of section 16, in the township of Bridgewater, Washtenaw county.

It appears undisputed that, in 1876, George Schmidt, the father of the plaintiff, died intestate, owning the above-described premises, constituting his farm, and leaving a widow, a daughter, and his two sons, George A. Schmidt, who is the plaintiff in these cases, and his brother, Henry W. Schmidt, as his heirs at law. Administration was delayed for a time, and it was some 5 years after Mr. Schmidt's death when it was had, and, in 1885, the estate was closed and the property decreed by the probate court to the said three children, subject to the dower interest of the widow. It is the claim of the plaintiff that in 1892, about the time he became 21 years of age (his brother, Henry, being some 7 years older) the children and mother all met together at the farm, and it was then and there verbally agreed between Henry and the plaintiff that Henry should surrender and grant to the plaintiff all of his interest as heir at law of their father in said farm, upon the terms and conditions that the plaintiff should enter upon the farm, put it in proper condition, work the same (it being the claim of the plaintiff that it was then considerably dilapidated and run down), and take care of the mother and sister during their respective lives, and that he, the plaintiff, should have

Henry's interest in the farm. It is the further claim of the plaintiff that he agreed to this proposition, and entered into such agreement and upon the performance of the contract, and has ever since continued in possession of the farm and to care for his mother and sister, and that Henry has never since claimed any interest in the farm, but has practiced his profession of a physician at Chelsea, in said county, during all the years since 1892. The circuit judge, who heard and saw all of the witnesses in the cases (with the exception of one absent witness who made deposition), found that the parties named made an agreement such as is claimed by the plaintiff, and in the manner substantially as stated in the bills of complaint. It is undisputed that during all of the years that have intervened since 1892, the plaintiff has continued to possess, occupy, and operate the farm, and that he, with his mother and sister, have constituted the family; neither he nor his sister having ever married. The evidence is also undisputed that at the time of this claimed arrangement and agreement Henry was not indebted to any persons, and no part of the indebtedness which is hereafter mentioned had at that time accrued. It does appear, however, that a short time prior to the levy of the executions, which we shall later refer to, a judgment was obtained against Henry by defendant William P. Schenk for \$300 and costs, and execution issuing thereupon was levied upon the premises on the 30th day of June, 1914, upon "the said right, title and interest of said Henry W. Schmidt in and to said lands (describing them), being estimated as a one-third interest"; also the sheriff filed a certificate of levy under said execution in the office of the register of deeds of said county upon the same day. It also appears that a judgment was obtained by the defendant Jacob Steinbach against Henry for \$479.92 and costs, and execution issuing thereupon

was levied upon the same premises on the 15th day of July, 1914, the interest being described in the same manner, and a certificate of levy was duly filed with the register of deeds in that case. Upon learning that such levies had been made, the brother, Henry W., and his wife gave to the plaintiff a quitclaim deed of the premises, bearing date August 7, 1914, and the bills were filed in these cases August 15, 1914. The learned circuit judge, while he found that the parties named made an agreement such as is claimed by the plaintiff in the cases, was of the opinion that the cases were ruled and controlled by *First National Bank v. Phillpotts*, 155 Mich. 331 (119 N. W. 1), and he added:

"I am still of the opinion that the alleged surrender of the interest of the brother to the complainant, whether intentional or otherwise, operated as a secret trust, and as to the creditors of Henry W. Schmidt was fraudulent"

—and dismissed the bills of complaint. The plaintiff has appealed.

We have examined the *Phillpotts Case* with a great deal of care, and are of the opinion that it is not controlling in these cases. No question of possession entered into the consideration of the *Phillpotts Case*. Here it is undisputed that the plaintiff has, at all times since 1892, been in possession of the premises, and has been proceeding to carry out the contract made with his brother, and we have no doubt that, when that contract is fully performed by him, if it ever is, it will be in the power of a court of chancery to compel the specific performance of said agreement, thus taking the cases out of the statute of frauds.

It is equally true that the legal title of the undivided one-third part of said premises, subject to the widow's right of dower, is still in Henry, and that such legal title is subject to levy by execution. The plaintiff is at present in no condition to file a bill for specific

performance of said contract with Henry, because he has not fully performed the same. There cannot be specific performance at the present time because the period for performance has not yet arrived. But, in our opinion, he is entitled to protection under his contract, and any sale of the premises under the executions must necessarily be subject to the contract rights of the plaintiff. The distinction between the levy of attachments and of executions should be borne in mind. Our present statute (4 How. Stat. [2d Ed.] § 11386, 3 Comp. Laws 1915, § 12898), relating to the levy of executions, provides for the filing of a notice of levy with the register of deeds, and further provides that upon said notice being filed, such levy shall be a lien thereon from the time that such notice shall be deposited, and—

“the lien thus obtained, shall, from the filing of said notice, be valid against all prior grantees and [mortgagees] mortgages of whose claims the party interested shall not have actual nor constructive notice.”

The purpose of the amendment of our statute in 1889 (Pub. Acts 1889, Act No. 227) was to change the rule which had previously existed, and to give a levy under an execution the same priority accorded to a conveyance duly recorded. *Campbell v. Keys*, 130 Mich. 127 (89 N. W. 720); *First National Bank v. State Savings Bank*, 130 Mich. 332 (89 N. W. 941); *Gardner v. Mason*, 130 Mich. 436 (90 N. W. 28).

Much stress is laid by plaintiff's counsel upon the fact that the plaintiff was in the actual possession of the lands in question at the time the levies of execution were made. Many cases are cited, including the following: *McKee v. Wilcox*, 11 Mich. 358 (83 Am. Dec. 743); *Woodward v. Clark*, 15 Mich. 104-112; *Converse v. Blumrich*, 14 Mich. 109-120 (90 Am. Dec. 230); *Russell v. Swezey*, 22 Mich. 235-239; *Dunks*

v. *Fuller*, 32 Mich. 242; *Hommel v. Devinney*, 39 Mich. 522; *Seager v. Cooley*, 44 Mich. 14 (5 N. W. 1058); *Michie v. Ellair*, 54 Mich. 518 (20 N. W. 564); *Weisberger v. Wisner*, 55 Mich. 246 (21 N. W. 331); *Stevens v. Castel*, 63 Mich. 111-120 (29 N. W. 828); *Schweiss v. Woodruff*, 73 Mich. 473-477 (41 N. W. 511); *Moore v. Township of Kenockee*, 75 Mich. 332-341 (42 N. W. 944, 4 L. R. A. 555); *Lambert v. Weber*, 83 Mich. 395-404 (47 N. W. 251); *Corey v. Smalley*, 106 Mich. 257-260 (64 N. W. 13, 58 Am. St. Rep. 474); *Brady v. Sloman*, 156 Mich. 423 (120 N. W. 795). Most of the above-cited cases, while stating the general doctrine, were not cases in which the party in possession was a tenant in common. The precise question here is whether such possession by plaintiff, a tenant in common, was notice of any more than his record title, as shown by the proceedings in the probate court.

In the case of *Weisberger v. Wisner*, *supra*, the question involved the rights of a tenant in common. In that case Wisner, in addition to the deeds which made him legal owner of an undivided three-fourths of the premises involved, had a contract which was perfectly legal and binding, and under which he was to become entitled, when he made certain payments, to a deed of the other one-fourth. With the record in that condition, Chief Justice COOLEY, in that case, said:

"If Wisner had held a deed of the remaining interest in the land which then appeared to stand in Muzzy, we see no reason why his possession should not have been constructive notice of it. It is true, as complainant says, that the possession was not apparently inconsistent with the record title; but this may be said in any case. It is possible that any possession may be that of a licensee or otherwise subordinate to the record title; and if that were sufficient reason for holding that the possession is no notice of actual rights, the principle on which decisions have been

made, giving protection to occupants, would have very limited application.

"If Wisner had held no deed of an interest in the land, but had been in possession under a contract of purchase, the possession would indisputably have been notice of his rights. Why it should be any less so when his title has been in part completed by conveyances is not apparent. The conveyances, one would think, ought to fortify and strengthen his equities, instead of weakening and putting them in danger. It seems to be unquestionable that Wisner occupied exclusively, and White would have learned this fact on inquiry. No reason is apparent why he should not have been held bound to inquire, as much in this case as in any other. See *Hardy v. Summers*, 10 Gill & J. (Md.) 316 (32 Am. Dec. 167), in which, upon similar facts, the possession was held to give notice."

This case was cited in *Corey v. Smalley*, *supra*. See, also, 27 Cyc. p. 1189 and 38 Cyc. p. 74, where it is said:

"It has been held that the possession of a cotenant is ordinarily notice to a purchaser of the whole interest that such cotenant may have in the estate," citing English cases.

We think that the weight of authority is in favor of the proposition that the actual possession or occupancy of land by a tenant in common is sufficient to put another upon inquiry, and that such other is chargeable with a knowledge of all the facts which he might have learned by making such inquiry of the party in possession. However, the plaintiff is not entitled to relief under his bills of complaint in any view of the subject, because the legal title to this land stood, at the time of the levies, in Henry, and such title was liable to levy upon execution, subject to the rights of the plaintiff who was in possession, but any sale of Henry's legal title must be held to be in subordination to the rights of the plaintiff under his contract in said land; and the rights of the plain-

tiff, so long as he continues to perform the contract, cannot be disturbed by the purchaser of the legal title standing in Henry's name.

Notwithstanding the quitclaim deed of Henry and wife to the plaintiff, made after the levies, the position and standing of the plaintiff in these suits, relating to Henry's interest in the farm, are no better than they were when the levies were made, and are the same as though Henry had deeded to the defendants at the time of the respective levies. Such deeds, had they been made, would have been subject to the plaintiff's equities, whatever they were.

The bills of complaint must therefore be dismissed, but without prejudice to the rights of the plaintiff to protect his possession and occupancy of the premises until such time as his equitable interest or title shall entitle him to specific performance of the said contract. The bills of complaint will therefore be dismissed, and the decrees below affirmed, with costs to the defendants.

KUHN, OSTRANDER, MOORE, STEERE, and BROOKE, JJ., concurred. BIRD and PERSON, JJ., did not sit.

PATRONS' MUTUAL FIRE INSURANCE CO. v. BUTLER.

1. INSURANCE—MUTUAL POLICY—BENEFIT ASSOCIATIONS—CANCELLATION—DUES.

Where defendant surrendered a certificate of fire insurance in a mutual benefit corporation, and the secretary canceled her policy, she was liable for the amount of her pro rata share of the losses and expenses during the period from the last assessment to the time of cancellation, and, on the trial of an action for the alleged indebtedness, the insurer was entitled to a finding that the sum in question became payable immediately on the receipt of her request for cancellation, and "that it was not necessary for the company to make an assessment roll and place thereon the members of plaintiff company" before it could recover.¹

2. SAME.

The member withdrawing is obligated to pay, not only all regular assessments outstanding against him, but also all other sums that might lawfully be made the subject of assessment at the time of surrender, and it is payable at once on ascertainment.

3. EVIDENCE—CONCLUSION—AMOUNT DUE—PROOF.

Testimony of the secretary that a sum named by him was due from defendant and that it was her ratable proportion of the assessment made a *prima facie* case.

Error to Arenac; Sharpe, J. Submitted October 5, 1916. (Docket No. 45.) Decided December 21, 1916.

Assumpsit in justice's court by the Patrons' Mutual Fire Insurance Company of Michigan, Limited, against Mrs. George Butler for assessments due on a policy of insurance. From a default judgment for plaintiff,

¹Authorities passing on the question of rescission or cancellation of contract by mutual fire insurance company, are collected in a note in 32 L. R. A. 492.

defendant appealed to the circuit court. Judgment for defendant. Plaintiff brings error. Reversed.

G. C. Leibrand, for appellant.

R. J. Crandell, for appellee.

STONE, C. J. This action was brought to recover from defendant her *pro rata* portion of losses and expenses of plaintiff from August 1, 1910, the date of the last assessment, to April 21, 1911, the date when her policy was canceled. Plaintiff is a domestic mutual farmers' fire insurance corporation. On August 31, 1909, defendant made a written application for insurance in plaintiff company. On that application the company issued to the defendant a policy on September 17, 1909. The articles of association and by-laws of the company were printed on the policy, and were a part of the policy contract. On April 21, 1911, defendant sent her policy to the secretary of the plaintiff company, with a request for its cancellation, and it was canceled on that date. Defendant had paid all amounts due on her policy for the losses and expenses of the company to the date of the 1910 assessment roll, which was August 1, 1910. At the time defendant sent in her policy for cancellation the secretary of the company computed her share of the losses and expenses of the company from the date of the 1910 assessment roll, to the date when she sent in her policy for cancellation, and found it to be \$10.22. This amount was ratable with all other members of the company covering the same period of time; and the secretary notified defendant of the amount due when she sent in her policy for cancellation. No assessment roll was made at that time. For this amount defendant's name did not appear on the 1911 assessment roll, or on any other roll until her name appeared on the 1914 delinquent roll along with other persons who

had ceased to be members, but who, it was claimed, were owing the company, and whose policies had been canceled between regular assessment periods. The case was tried in the circuit court by the court without a jury, and, upon written request, findings of fact and law were made by the court. Upon the trial the application and policy were received in evidence.

E. A. Holden, the secretary and treasurer of the company, was sworn as a witness. He testified, in substance, that the policy in question was sent to his office by defendant for cancellation, and canceled on her request on the 21st day of April, 1911; that the 1910 assessment against defendant was paid by her, but that there was due the company from defendant, at the time of the cancellation, her share of the losses and expenses from the date of that assessment roll, August 1, 1910, to the date of cancellation, April 21, 1911, \$10.22, and that that amount appeared on the assessment roll, known as the "delinquent assessment roll" of 1914, the amount there appearing being \$10.22. He further testified as follows:

"That is not a full year's assessment, just up to the date of cancellation. The amount assessed against Mrs. Butler on that roll is ratable with all other members of the company covering the same period of time. The amount now due is \$12.72."

On cross-examination he testified that the company notified the defendant how much was due at the time she sent the policy in for cancellation; and he further testified, in answer to the following question, as follows:

"Q. I asked you if you let the policies run after cancellation for two or three years before you make the assessment?

"A. Well, we notify them the amount due at the time of cancellation. We don't levy the assessment roll. We make the computation at the time the best

we can compute it at that time when they send it in. Then we dun them two or three times, and if they don't pay—

"Q. Then you make a new assessment roll covering these items?

"A. We make the assessment roll.

"Q. Covering these items?

"A. Yes."

Section 19 of the by-laws of the company reads as follows:

"Any policy of insurance written by this company may be canceled by the holder thereof by surrendering the same to the secretary of the company for cancellation and by payment of the assessments and obligations as provided in the constitution and by-laws of said company, to the time of such cancellation."

In its finding of fact the court made no reference to the uncontradicted testimony of the secretary as above set forth, nor to the facts testified to by him, but did find that:

"To prove the amount due by her to the company the plaintiff put in evidence what was called the 'delinquent roll,' and described the contents of such roll.

In its conclusions of law, the trial court found that:

"Sufficient proof was not offered of a valid assessment on the delinquent roll to render defendant liable to pay the same. While I do not conclude that plaintiff's books must be produced, I am of the opinion that the assessment roll must inform the members charged thereon of the total of the losses which have been sustained, and the expenses and liabilities included therein, which it is sought to make the defendant pay, in order that she may see that she has been ratably assessed."

And the court directed a judgment for the defendant to be entered. The plaintiff duly excepted to the findings of fact and conclusions of law, and proposed

the following amendment to the finding of facts, so that such finding should read as follows:

"On April 21, 1911, defendant surrendered her policy to the secretary of plaintiff company with request for cancellation. The officers of the company canceled her policy on that date. The secretary of the plaintiff company computed the amount due and owing by defendant for her share of the losses and expenses of the company from August 1, 1910 (to which date her last paid assessment extended), to April 21, 1911, the date of the cancellation of her policy, found the same to be \$10.22, and notified Mrs. Butler of such indebtedness. The amount, never having been paid, was included in the delinquent assessment roll made December 24, 1914, at the same amount of \$10.22. This principal, together with 5 per cent. per annum interest from the date of the cancellation of the policy, April 21, 1911, to the date of the trial, March 13, 1916, amounts to \$12.72 at the date of the trial."

Plaintiff also proposed amendments to the conclusions of law, so that the same should read as follows:

"The undisputed testimony shows that defendant's policy was canceled at her request upon being surrendered by her to the secretary of the company on April 21, 1911, and that there was due and payable at that time by the defendant for the losses and expenses of the company from August 1, 1910, to April 21, 1911 (the date of the cancellation of her policy) \$10.22, of which she was notified by the secretary of plaintiff company.

"That the amount of \$10.22 became immediately due and payable by the defendant to the plaintiff, upon the surrender of her policy, with her request for cancellation; that it was not necessary for the company to make an assessment roll and place thereon all the members of plaintiff company, together with defendant, before a liquidated indebtedness by the defendant to the plaintiff was established; that the computation of the defendant's share of the losses and expenses of the company, from the time at which the last assessment (August 1, 1910) had satisfied the obligations of the company, to the cancellation of the policy (April

21, 1911) by the secretary of the plaintiff company is conclusive and binding on the defendant, in the absence of any objection by her that such computation was not correct. * * *

"I further find that the oral testimony of Mr. Holden, secretary of plaintiff company, as to the amount owing by the defendant at the date of the cancellation of her policy, was properly admitted, and is evidence of the indebtedness of the defendant to the plaintiff."

A further conclusion of law was proposed by the plaintiff, to the effect that the plaintiff was entitled to recover the sum of \$10.22, with interest at 5 per cent. from April 21, 1911, to the date of the trial.

The proposed amendments were all refused by the court, to which plaintiff duly excepted. A judgment having been entered for the defendant, the plaintiff has brought the case here by writ of error, and the assignments of error fairly raise the question whether the plaintiff made a *prima facie* case at the circuit. We agree with the trial court that the "delinquent assessment roll," so called, did not, of itself, entitle the plaintiff to recover. Nor do we think that an assessment roll was essential to plaintiff's recovery. It is manifest that upon surrender and cancellation of defendant's policy, it became her duty to pay "the assessments and obligations" as provided in the by-law above set forth. The assessments had all been paid, but she was under obligation to pay her ratable share of losses and expenses incurred between the date of the last assessment and the cancellation of the policy. That amount had been computed, and the amount stated in the "delinquent roll." It might have appeared in any other statement, or in none. The secretary had testified that:

"The amount assessed against Mrs. Butler on that roll is ratable with all other members of the company covering the same period of time. The amount now due is \$12.72."

If defendant was not satisfied with this testimony, she might well have cross-examined him upon that subject. It would seem that the basis of such statement must have been accessible to the secretary, and the manner of computation readily explained by him. With the records required to be kept, by the articles of association and the by-laws, the membership of the company and the amount of insurance carried at the date of cancellation must have been ascertainable; also the amount of losses and expenses incurred since the date of the last assessment. We are of opinion that defendant was legally liable to pay this obligation upon the cancellation of her policy, on demand.

We think that too much stress was laid upon the "delinquent roll," and too little upon the testimony of the secretary by the trial court, and that the plaintiff made a *prima facie* case upon the trial.

We think that our decisions are to the effect that upon the surrender of a policy, by a withdrawing member, he must pay, not only all regular assessments outstanding against him, but also all other obligations that might lawfully be made the subject of assessment at the time of surrender, and that this amount is payable at once upon ascertainment. *Ionia, etc., Ins. Co. v. Otto*, 96 Mich. 558 (56 N. W. 88); *Ionia, etc., Ins. Co. v. Ionia Circuit Judge*, 100 Mich. 606-610 (59 N. W. 250, 32 L. R. A. 481); *Peake v. Yule*, 123 Mich. 675-680 (82 N. W. 514).

"The principle deducible is that a member cannot, by a surrender, escape liability for such obligations as might lawfully be made the subject of assessment at the time of his surrender." *Ionia, etc., Ins. Co. v. Otto, supra*.

In our opinion the plaintiff was entitled to the finding of fact proposed, as above indicated, as well as to the conclusion of law asked for, and that the trial

court erred in entering judgment for the defendant, upon the record as made.

The judgment below will be reversed, and a new trial granted, with costs to appellant.

KUHN, OSTRANDER, BIRD, MOORE, STEERE, and BROOKE, JJ., concurred. PERSON, J., did not sit.

COLE *v.* COLE.

1. DIVORCE—EXTREME CRUELTY—PROFANE OR OBSCENE LANGUAGE.

Evidence in a suit for divorce *held*, to sustain a decree for plaintiff on the grounds of extreme cruelty and profanity in the presence of the wife and children.

2. SAME—PROSECUTING ATTORNEY—APPEARANCE.

Failure to serve a subpoena on the prosecuting attorney and his non-appearance in court did not affect the jurisdiction and were mere irregularities.

3. SAME—AMENDMENT—DISCRETIONARY POWER.

A wide discretion is vested in courts of chancery to allow amendments to a bill to conform to the proofs taken.

4. SAME—EVIDENCE.

And, *held*, that such discretion was not abused in refusing defendant's request to open the case for further proofs, on the showing made, under Act No. 314, Pub. Acts 1915, 3 Comp. Laws 1915, § 12478.

5. SAME—BILL FOR SEPARATE MAINTENANCE—ABSOLUTE DIVORCE—POWER OF COURT.

Under Act No. 324, Pub. Acts 1907, the court did not err in granting a decree of absolute divorce, upon testimony which entitled plaintiff to the same, and that, though the prayer was for separate maintenance, no reference

being made in the pleadings to 3 Comp. Laws 1915, § 11399. The subject is one for the discretion of the court below.

Appeal from Wayne; Perkins, J., presiding. Submitted October 17, 1916. (Docket No. 132.) Decided December 21, 1916.

Bill by Julia Cole against Charles W. Cole for separate maintenance and alimony. From a decree for complainant, defendant appeals. Modified and decree for absolute divorce entered.

William Van Dyke, for complainant.

Bennett & Miller, for defendant.

STONE, C. J. The original bill of complaint in this case was filed to obtain a decree for a "separate maintenance from the bed and board of the defendant," for the custody of three minor children of the parties, for alimony, and that certain real estate of the parties be "set off and aside as the separate property" of the plaintiff, as part of the provision for her separate maintenance. The grounds for the decree, as stated in the original bill, were as follows:

"That said Charles W. Cole has become an habitual drunkard since the marriage herein set forth, and is so habitually addicted to the use of intoxicating liquors that he can no longer resist, and is drunk and under the influence nearly every day, and while in such condition is irresponsible and abusive; that said Charles W. Cole, being of sufficient ability so to do, now fails and neglects and refuses to provide any money for the support of your oratrix and said children."

The answer contained a specific denial of the grounds stated in the bill, charged the plaintiff with extreme cruelty, and prayed the benefit of a cross-bill, and that defendant be granted an absolute divorce. Upon the hearing there was testimony of extreme

cruelty on the part of defendant toward plaintiff, and defendant gave testimony tending to deny the same. At the close of the evidence, it was urged by defendant's counsel that the bill of complaint did not charge extreme cruelty. Thereupon, the plaintiff was granted leave to file an amended bill of complaint, charging extreme cruelty to conform with the testimony upon that subject. An amended bill was filed and sworn to by plaintiff. It contained the following additional allegation:

"That said Charles W. Cole has used personal violence towards plaintiff; abuses, annoys, nags her, and is continually complaining without cause of the household affairs; is constantly quarrelsome and nagging; uses vile language, curses, and swears at plaintiff in the presence of their children—all of such treatment constituting extreme and repeated cruelty toward plaintiff."

Thereupon the defendant answered the amended bill, and moved the court for an order opening the proofs and permitting additional testimony upon the subject of cruelty. The application did not state any proposed new testimony, and the court refused to open the case, holding that the subject, upon its merits, had been fully gone into upon the hearing.

A decree was entered in the court below, stating that the material averments in the bill of complaint were true, and particularly that the defendant had been guilty of extreme and repeated cruelty toward plaintiff, and that she was entitled to relief. It further ordered and decreed that the plaintiff was entitled to separate maintenance from the defendant, and that she be allowed, and defendant should pay to her, the sum of \$16 per month for the support of herself and the younger children, to wit, Adeline Cole and Helen Cole, until the older of said children should attain the age of 21 years, die, be married, or become self-sup-

porting, when said sum should be reduced to \$8 for the support of the younger of said children, and until she should attain the age of 21 years, die, be married, or become self-supporting; and further providing that, if either of said children should die under age then the said sum should be reduced to \$8, and if both should die no further payments should be made; and providing that said sum should be paid to the register in chancery on the first day of each and every month thereafter, the first payment to cover the month of February, 1916. The decree further gave the plaintiff the custody of the minor children of the parties. It further adjudged that the use, occupancy, and possession of the real estate of the parties as described in the bill of complaint, and known as 1429 Chene street in the city of Detroit, 28 Warsaw Place in the city of Detroit, and 1401 Harper avenue in the township of Hamtramck, "because of the extreme cruelty aforesaid and his neglect to support the said Julia Cole and the children aforesaid, be allotted, assigned, set apart and decreed to her as alimony for her support, and its possession and control to her awarded, such allotment order and setting aside being during the joint lives of the said parties, or until further order of this court"; providing that said plaintiff should maintain said properties and keep up payments, interest, taxes, and assessments upon the same, and keep the same reasonably insured against fire.

The cross-bill in defendant's answer was dismissed without prejudice to the right of defendant, in the event of cause for divorce arising subsequent to the decree. The defendant has appealed from this decree. He makes objection to the proceedings as follows:

- (1) There was no appearance by the prosecuting attorney to represent the people in this litigation, although there were two minor children of tender age.
- (2) The petition contained no charge of extreme

cruelty, merely abuses while under the influence of liquor.

(3) An amended petition averred extreme cruelty, was answered under oath by permission of the court, but permission to present proofs in support of this answer was denied the defendant.

(4) That the sole cause clearly set out in the original petition, namely, drunkenness, was not shown by any evidence upon the hearing.

The serious objection, however, that is urged by counsel for defendant, is that there should have been a decree of absolute divorce granted by the court below.

A careful perusal of the record shows that there was ample testimony on behalf of the plaintiff of extreme cruelty by the defendant, consisting not only of personal violence, destruction of furniture and household goods, but also of profane and obscene language in the presence of plaintiff and her children. We are of opinion that the evidence was such as to justify the court in finding that a cause for divorce had been established by the plaintiff's testimony, and we are not disturbing the finding of the court upon that question.

There is abundant proof to show that these parties have become so estranged that it will be impossible for them to assume their relations as husband and wife. As was said by this court in *Utley v. Utley*, 155 Mich. 258 (118 N. W. 932):

"We agree with the learned circuit judge in finding that the charges of cruelty are sustained. These are charges of personal violence and of threats to do complainant personal injury, the effects of which are to make her nervous and constantly afraid. We are impressed that the parties should be relieved entirely of the relations entered upon with their marriage, and that a disposition of the property should be made which will render personal relations of any kind unnecessary and unlikely to occur."

Referring to the matters of practice complained of by defendant's counsel, we are of the opinion that the failure to serve the subpoena on the prosecuting attorney, and his nonappearance in the case, did not affect the jurisdiction of the court, and were mere irregularities; and, it appearing that the interests of the children have been fully protected, the decree should not be disturbed for those reasons.

We have no doubt of the power of the court below to permit the filing of the amended bill of complaint. A wide discretion is vested in courts of chancery to allow amendments to a bill to conform to the proofs taken. *Babcock v. Twist*, 19 Mich. 516; *Church v. Holcomb*, 45 Mich. 29 (7 N. W. 167); *Dodson v. McKelvey*, 93 Mich. 263 (53 N. W. 517). See, also, chapter 16, § 1, judicature act, Act No. 314, Pub. Acts 1915, 3 Comp. Laws 1915, § 12478). The record shows that the subject of extreme cruelty had been fully gone into by both parties upon the hearing, and we think that there was no abuse of discretion on the part of the court in refusing to open the case for further proofs, upon the showing made.

An important question in the case is whether this court has the power to grant an absolute divorce herein, and that depends upon whether this bill can be said to have been filed under section 8686, 3 Comp. Laws, 3 Comp. Laws 1915, § 11479. That was an act passed in 1889, and was entitled:

"An act to provide wives with property and maintenance from their husbands' estates when neglected or deserted by them, or when the husband has become an habitual drunkard or has practiced extreme cruelty towards his wife or committed any offense sufficient to entitle the wife to a decree of divorce or separation." Act No. 243, Pub. Acts 1889.

There is nothing in this statute authorizing the court to provide separate maintenance from bed and

board of the defendant for life, or any term of years. The idea of a separate maintenance or a decree from bed and board is not within the purview of this statute. A perusal of both the original and amended bills of complaint in the instant case will show that no reference is made to this statute. As was held in *Horning v. Horning*, 162 Mich. 130 (127 N. W. 275), the bill of complaint is in form and substance in every particular a bill for divorce, except the prayer, which is for an allowance for separate maintenance from bed and board of defendant in accordance with the statutes of this State. The bill alleges the marriage of the parties, the names and ages of the children, and noncollusion and nonconniving clauses required in a bill for divorce, and the *jurat* thereto complies with the statute relating to divorces. It would seem that the decree below was for the separate maintenance from bed and board for life, or until the further order of the court. Such a decree of separation was formerly called "*a mensa et thoro*," and such a decree is recognized as a decree of divorce. *Horning v. Horning*, *supra*. We think the bill of complaint in this case was so similar to the bill of complaint in the *Horning Case* that the doctrine of that case should apply here. While not controlling, it is a significant fact that, upon the hearing of this case before the court, plaintiff's counsel stated that it was a divorce case. We have examined in this connection the case of *Lacey v. Lacey*, 189 Mich. 271 (155 N. W. 489). In that case the bill was filed under the provisions of section 8686, 3 Comp. Laws. In it the plaintiff prayed neither for a divorce nor a separation, but her prayer was for financial aid and maintenance only. Justice STEERE, in the course of the opinion, used the following language:

"While, in suits for divorce either limited or absolute, the court to which application may be made is held vested with discretionary authority to grant an

absolute divorce against the desires of the complaining spouse found to be in the right (although only a limited divorce with separate maintenance has been requested), we do not find that under this statute, where no separation of any kind is asked or desired by petitioner, a decree forcing an absolute divorce upon an innocent wife has been sustained."

There is nothing in that opinion, in our judgment, inconsistent with holding that we have authority in the instant case, under our present statute, to grant an absolute divorce.

In *Burlage v. Burlage*, 65 Mich. 624 (32 N. W. 866), and in *Sullivan v. Sullivan*, 112 Mich. 674 (71 N. W. 487), it was held that the court might, in its discretion, grant an absolute divorce although the complainant asked for a decree of separation only. But by Act No. 135, Pub. Acts 1905, it was provided that no divorce from the bonds of matrimony for either of the causes mentioned in the statute should be entered in any case where the same was not asked for by the complainant in the bill of complaint filed therein, or by the defendant on a crossbill. However, by Act No. 324, Pub. Acts 1907, 3 Comp. Laws 1915, § 11399, the statute was again amended to read as follows:

"But no divorce from the bonds of matrimony for either of the causes mentioned in the preceding section shall be entered in any case where the same is not asked for by the complainant in the bill of complaint filed therein, or by the defendant on a cross-bill unless the court hearing the evidence shall deem it for the best interests of the parties to grant a divorce from the bonds of matrimony and in that event the court may grant such divorce."

Under this provision of the statute, the subject was recommitted to the discretion of the court, and the cases of *Horning v. Horning*, *supra*, *Coon v. Coon*, 163 Mich. 644 (129 N. W. 12), and *McCue v. McCue*,

191 Mich. 1 (157 N. W. 369), have been followed. We have therefore no doubt of the right of this court to enter a decree of absolute divorce in favor of the plaintiff in this case; and in our judgment, that course should be taken, and the decree will so provide.

The evidence shows that the property of these parties, consisting of real estate, is held by them as tenants by the entirety under land contracts. We think there should be a division of this property between the parties. As we understand the record, the homestead, now occupied by the plaintiff and family, is the property known as 1401 Harper avenue in the township of Hamtramck. There is a considerable sum still unpaid upon this land contract. We understand that the property known as 1429 Chene street in the city of Detroit has been fully paid for. These two pieces of property should, in our opinion, be assigned and decreed to the plaintiff as her sole, separate, and absolute property in fee, subject to the land contracts, and the same will be so ordered and decreed. This provision is made in lieu of the dower of the wife in the real property of the defendant, and such provision shall be in full satisfaction of all dower and other claims that plaintiff may have in any property or real estate which the defendant will obtain by this decree, or may hereafter own, or in which he may have any interest. The remaining piece of real estate, known as 28 Warsaw Place, city of Detroit, will be, by the decree, assigned and set over to the defendant as his sole, separate, and absolute property in fee, subject to the land contract, free and clear from dower or other claims or rights of the plaintiff therein, except that plaintiff shall have a lien thereon for the payment of the alimony herein provided.

We are not disposed to disturb the decree of the court below in the provision for payment to the plaintiff by the defendant of \$16 per month upon the terms

and as provided for in the decree below, except in this: In the making of payment by the defendant to plaintiff of said \$16 per month since the making of the decree below, there may be deducted from such payment any sum which the plaintiff has received as rent of 28 Warsaw Place over and above any expenditures which she has made thereon for taxes, insurance, repairs, or other improvements during that period.

The decree for costs below will stand affirmed, and an additional solicitor's-fee to the plaintiff in this court of \$30 will be allowed. No other costs will be decreed in the case. A decree will be prepared in this court in accordance with this opinion.

KUHN, OSTRANDER, BIRD, MOORE, STEERE, and BROOKE, JJ., concurred. PERSON, J., did not sit.

OSBORN v. DETROIT KRAUT CO.

1. EQUITY — BILL OF COMPLAINT — FRAUDULENT CONVEYANCES — PLEADING — MORTGAGES — SETTING ASIDE INSTRUMENTS.

Averments of complainant's bill to follow corporate property and in the nature of a creditor's suit that a mortgage from defendant corporation to one of its stockholders was void, justified the admission of evidence that the corporation was not indebted to the mortgagee.

2. ASSIGNMENT — MORTGAGES — FRAUDULENT CONVEYANCES — PLEDGE.

The assignee of a mortgage, which was executed by a corporation to a majority stockholder, and assigned as collateral security to another stockholder, who had notice or knowledge of the facts, did not stand in a better position than the mortgagee.

3. FRAUDULENT CONVEYANCES—CORPORATIONS—CONSIDERATION.

That the mortgagee had executed a bond to guarantee an indebtedness of the corporation to a bank was a sufficient consideration for the transaction, as against a creditor.

4. SAME—FORECLOSURE—MORTGAGES.

In a suit to cancel two mortgages of a corporation running to stockholders of the company, the court had no power to foreclose one of them, which it determined to be a valid obligation.

5. SAME—CANCELLATION OF INSTRUMENTS.

The board of directors has power to authorize the execution of a mortgage to secure corporation debts, which such action does not tend to increase.

6. SAME—PLEDGE—ASSIGNMENT—TRANSFER ON BOOKS.

One who held corporate stock as a pledge, without transferring the stock certificates on the books, merely entering a memorandum on the stubs in the certificate record, was not entitled to notice of a meeting of the stockholders.

7. SAME.

The holder of corporate stock, belonging to a majority stockholder as collateral security for notes of the corporation, is a simple contract creditor, not entitled to an equitable lien in the nature of a mortgage on the property of the corporation, but is entitled to have the entire stock so held transferred in his name on the failure of the corporation to pay some of the notes.

Appeal from Wayne; Hosmer, J. Submitted October 11, 1916. (Docket No. 130.) Decided December 21, 1916.

Bill by Francis C. Osborn against the Detroit Kraut Company, Elbridge G. Newhall, and Cornelia Lyon to set aside certain mortgages given by defendant corporation, to establish a lien in the nature of a mortgage and to foreclose the same. From the decree rendered, complainant and defendant Lyon appeal. Reversed in part and decree entered.

J. O. Murfin, for complainant.

Henry B. Graves, for defendant Lyon.

STONE, C. J. The bill of complaint herein was filed to set aside two real estate mortgages given by the defendant corporation, the Detroit Kraut Company, one having been given to the defendant Elbridge G. Newhall and the other to the defendant Cornelia Lyon, and that plaintiff be decreed to have a lien in the nature of a mortgage upon all the property and assets of said corporation, and to foreclose the same.

A brief statement of the facts is necessary to an understanding of the case. The Detroit Kraut Company was incorporated in May, 1909, with an authorized capital stock of 700 shares of \$10 each, making the authorized capital stock \$7,000. The organizers were defendant Newhall, as trustee, 350 shares, Charles E. Sweitzer, 25 shares, and Alva G. Pitts, 3 shares. The defendant Newhall became practically the sole person in control of the entire affairs of the corporation. In some way not clearly defined on this record he became the owner of the unsubscribed treasury stock, and also of Mr. Sweitzer's stock, so that out of a total of 700 shares of stock, aside from a few shares to enable parties to qualify as officers and directors, the defendant Newhall claimed to own all of the balance.

On March 24, 1911, through the instrumentality of the defendant Newhall, the defendant Kraut Company borrowed from the plaintiff \$5,000, evidenced by a promissory note for that sum, due one year after date, with interest at 7 per cent., payable quarterly. This note was indorsed by defendant Newhall and his wife, who was the daughter of the defendant Cornelia Lyon. Mrs. Newhall died before the hearing of this case. The note was not paid at maturity.

After a conference with Mr. Newhall, he induced the plaintiff, on March 25, 1912, to surrender the original note and to accept in lieu thereof a series of ten notes of \$500 each at the same rate of interest, the first falling due in one year, and \$500 each suc-

ceeding year, all indorsed by defendant Newhall, and each of these ten notes was secured by 66 shares of the capital stock of the Detroit Kraut Company representing shares issued to the defendant Newhall. The notes were duly made and delivered. Stock certificates indorsed in blank were delivered to plaintiff. The first note of said series was paid. In April, 1914, plaintiff was the holder of nine of said notes, and he held certificates indorsed to him in blank for 594 shares, out of 700 shares of the capital stock of the defendant corporation. It is undisputed that defendant Newhall, upon the stub of the stock certificate book, noted the fact of the indorsement of the first certificate as follows: "Coll. to note \$500. F. C. Osborn one year from date." (The other stubs were the same; except that the words "one year" appear "two years," "three years," etc., respectively.) While matters stood in this condition, a meeting of the stockholders was held on April 9, 1914. At this meeting it was ordered as follows:

"That the directors have authority to execute a mortgage upon the real estate of the company to Elbridge G. Newhall to secure him in the amount of \$4,008.36, being a part of the indebtedness of the company to him, and a second mortgage to Cornelia Lyon to secure her in the amount of her bonds to the First National Bank."

The plaintiff had no notice of this meeting, and did not attend it. As a result of this meeting a mortgage dated April 9, 1914, was executed and delivered by the Detroit Kraut Company for \$4,008.36 to defendant Newhall. On the same day and at the same time a mortgage was executed and delivered by said company for \$2,000 to defendant Cornelia Lyon, which last-named mortgage contained the following provision:

"To secure the payment of the principal sum of two thousand dollars, or any less amount which said mort-

gagee may be called upon to pay on account of a bond for said amount executed by her to the First National Bank of Detroit, and interest thereon from date at the rate of 6 per cent. per annum, payable semi-annually until the full payment of said principal sum from the date of such payment by her according to the terms of said bond, and will pay interest at the rate of 7 per cent. per annum semi-annually upon all overdue interest and principal from the time of its or their maturity."

It appears undisputed that the defendant Lyon, jointly with her son-in-law, defendant Newhall, had given a bond to the First National Bank of Detroit in the sum of \$2,000, by virtue of which they guaranteed payment at maturity of any notes of the Detroit Kraut Company. After she had received her mortgage she did pay to said bank \$1,644.81, and she was liable to said bank at the time of the execution of the mortgage to her as aforesaid.

The said Newhall mortgage was on the day of its execution assigned to Mrs. Lyon, and the two mortgages and this assignment were forthwith recorded. The Newhall mortgage was assigned to defendant Lyon to secure her against loss because of two bonds which she had signed for the accommodation and benefit of Newhall & Co. Newhall & Co. was the business name under which Mr. Newhall conducted a commission business in Detroit. The bonds ran to the First National Bank and to the Detroit Savings Bank. Because of these bonds Mrs. Lyon was thereafter compelled to pay to the respective banks a considerable sum of money. The plaintiff in his testimony stated that at the time he loaned the money as aforesaid he knew of the said indebtedness of the Kraut Company to the bank.

The bill of complaint was taken as confessed by the defendants Detroit Kraut Company and Elbridge G. Newhall. The defendant Cornelia Lyon answered.

The bill of complaint seems to have been filed upon the theory that the plaintiff was a stockholder of the defendant Kraut Company, and as such was entitled to notice of the stockholders' meeting. It states the giving of the two mortgages, and claims that they were given in prosecution of a plan, combination, and agreement on the part of the defendants Newhall and Lyon to defraud plaintiff, and to deprive him of his rights under said promissory notes and certificates of stock, and the bill alleges that the mortgages are void and of no force and effect—

“not only because of the illegality of said fraudulent stockholders' meeting, but because the same were made, executed, and delivered by said officers of said corporation for the mere purpose of defrauding your orator of his rights as such creditor as aforesaid of said corporation and a stockholder therein.”

The answer of the defendant Lyon denies all fraud and claims the validity of both of said mortgages, asks to have the bill of complaint dismissed, and prays for no affirmative relief.

The case was heard in the court below upon pleadings and evidence taken in open court. The court, in and by its decree, found that the said mortgage to the defendant Newhall was fraudulent and void, and of no force and effect, and ordered the same canceled, annulled, and held for naught. It found, as to the other mortgage, that it was valid and effectual as against said plaintiff and said defendant the Detroit Kraut Company, and, it having appeared to the court that there was then due upon said last-named mortgage the sum of \$1,644.81, together with interest thereon at the rate of 6 per cent. per annum from the 24th day of September, 1914, the decree proceeds to determine the amount due upon the mortgage at that date, and orders and directs a foreclosure of the same,

and a sale of the lands, as in an ordinary foreclosure decree.

The court below also found the amount which was due plaintiff upon the promissory notes which had matured, and also the amount that was owing, but not yet due, upon the remaining notes; that the said plaintiff was entitled to an equitable lien in the nature of a mortgage upon all of the land and premises mentioned in the bill of complaint and described in the decree for the said several sums of money, and decreed a foreclosure of the plaintiff's said lien, and provided for a sale and the execution of a deed. Both parties have appealed.

The defendant Cornelia Lyon has appealed because the court below set aside the Newhall mortgage, and she also complains that the decree provides for a foreclosure of her mortgage, although she prayed for no such thing in her answer, and asks to have the decree set aside in that regard.

Plaintiff has appealed because the court held the mortgage of Mrs. Lyon to be valid, and decreed as due to her the sum which she had paid upon the bond at the said bank on account of the indebtedness of the Kraut Company to the bank.

It is the claim of counsel for defendant Lyon that the bill of complaint nowhere alleges that the Newhall mortgage was void because there was nothing due Newhall from the said Kraut Company. From the quotation which we have made above from the bill of complaint we think it was claimed by the plaintiff that the mortgage was void and in fraud of plaintiff's rights, and that it was competent to show no indebtedness to Newhall. We have read this record with great care, and, while the circuit judge filed no reasons for his decree, we think that part of it which set aside the Newhall mortgage as void may well be sustained upon the ground that the evidence does not show that

any such sum of money, or any specific amount, was due the defendant Newhall from the said Kraut Company. The annual reports of the corporation, duly filed, gave no evidence of the existence of any such debt. A number of the books of account were missing at the hearing, and in fact appear to have been destroyed, and the testimony of Newhall was far from satisfactory. The other officer of the company who was examined was not aware of any such indebtedness to the defendant Newhall. It is true that he said he supposed there might be something due him, but the record is barren of any evidence of any probative force which shows that there was any just foundation for the mortgage to Newhall.

We think that part of the decree of the court below which set aside and held for naught said Newhall mortgage should be affirmed, on the ground that said mortgage was found to be fraudulent and void on the facts proven at the hearing. That mortgage being void, we do not think that the defendant Lyon stands in any better relation to it than did the defendant Newhall. He assigned it to her as collateral security because of her obligations to the bank to pay any indebtedness of Newhall & Co. We do not think that she stands in any better position, under the facts in this case, than did Newhall as to said mortgage.

The mortgage directly to Mrs. Lyon stands upon a different footing. She was at the time of its execution liable by reason of her bond to the bank guaranteeing indebtedness of the defendant Kraut Company, which was then owing. That part of the decree which found the amount due to her should be affirmed.

We do not think that under the pleadings in the case the court below had any power or authority to order a foreclosure of that mortgage; and, as the defendant Lyon asks that that part of the decree be vacated, and as this cannot injure the plaintiff, but will give the

company more time to redeem, that part of the decree which orders a foreclosure of that mortgage will be reversed.

The power of the directors, under the circumstances, to execute a mortgage to Mrs. Lyon to secure its liability and indebtedness to her, finds support in our own decisions. *Bank of Montreal v. Lumber Co.*, 90 Mich. 345 (51 N. W. 512); *O. W. Shipman Co. v. Railway*, 140 Mich. 589 (104 N. W. 24); *Haight v. Smith*, 178 Mich. 392 (144 N. W. 830). Nor do we think that the plaintiff was a stockholder in said company in the sense that he was entitled to any notice of the stockholders' meeting. The certificates of stock had been assigned to him in blank as collateral security to said notes, but the stock had never been transferred to him upon the books of the company. He was therefore not in the proper sense such a stockholder of the company as entitled him to a notice of the stockholders' meeting. The stock, in so far as the books of the company showed, stood in the name of the defendant Newhall, notwithstanding the memoranda which had been entered upon the stubs in the certificate of stock book. In fact, we are of the opinion that it was not necessary to hold a stockholders' meeting to authorize the mortgage to the defendant Lyon. We think that the directors had power to authorize the execution of this mortgage to secure corporate debts. Such mortgage did not increase the indebtedness of the company. 3 Cook on Corporations (7th Ed.), § 808, and cases cited: *Turney v. Brick Co.*, 184 Mich. 439 (151 N. W. 590).

We are unable to agree with the plaintiff and the court below that the plaintiff has any equitable lien in the nature of a mortgage upon the property of the defendant Kraut Company. He is simply a contract creditor, his only security being certificates of stock in the corporation issued to defendant Newhall and

indorsed by him in blank and delivered to plaintiff as collateral security in the ordinary way. In so far as this record shows, the plaintiff can have this stock transferred to him on application any day. It is sufficient in amount to be controlling. This will give him the right, subject to the mortgage of defendant Lyon, to control the destinies of the defendant Kraut Company, whatever they may be. While it is true that some of his notes have not yet matured, he has the right to have the entire stock transferred to him.

That part of the decree which gave to plaintiff a mortgage lien and foreclosed the same will be reversed.

Neither party having herein accomplished all that it has attempted to do, we are impressed with the fact that neither party is entitled to costs. The plaintiff and defendant Lyon will by the decree equally share and pay the expenses of procuring transcript of the evidence and printing the record. No other costs will be awarded. A decree will be entered in this court in accordance with this opinion.

KUHN, OSTRANDER, BIRD, MOORE, STEERE, and BROOKE, JJ., concurred. PERSON, J., did not sit.

**STORNELLI v. DULUTH, SOUTH SHORE & ATLANTIC
RAILWAY CO.**

1. MASTER AND SERVANT—PERSONAL INJURIES—SCOPE OF EMPLOYMENT—COURSE OF EMPLOYMENT.

Where plaintiff was hired by a railroad company, about a year before he was injured, to work as a hostler's helper, and the evidence showed he was to work in and around the roundhouse and assist the hostler in the discharge of his duties, which did not require him to go out on the main line or ride upon the engines, he could not recover for injuries that he sustained in jumping from a moving train and catching his foot in a frog. He was not injured in the course of his employment, although the engineer may have invited plaintiff to ride. Nor did he alight under orders because he saw the engineer motion to him to get off. The invitation was outside of the scope of the engineer's authority.¹

2. SAME—INVITATION TO RIDE—SCOPE OF AUTHORITY.

Where it was not within the scope of authority of the engineer to invite him to ride, and, where there was no evidence that plaintiff was ordered to jump from the moving train, and only a scintilla of evidence that he was invited to ride on it, the defendant railway corporation could not be held responsible, in a case for negligent injuries against a company that did not come under the compensation act.

3. SAME—NEGLIGENCE—BURDEN OF PROOF.

The burden rested upon the plaintiff, in order to recover, to show negligence, although the workmen's compensation act deprives the employer of other defenses. 2 Comp. Laws 1915, § 5423 *et seq.*

Error to Chippewa; O'Brien, J., presiding. Submitted October 19, 1916. (Docket No. 77.) Decided December 21, 1916.

¹As to application and effect of the workmen's compensation act generally, see note in L. R. A. 1916A, 23.

Case by Antonio Stornelli against the Duluth, South Shore & Atlantic Railway Company for personal injuries. Judgment for defendant, *non obstante veredicto*. Plaintiff brings error. Affirmed.

McDonald & Kaltz, for appellant.

Warner & Sullivan (*A. E. Miller*, of counsel), for appellee.

STONE, C. J. Action on the case to recover damages for personal injury of plaintiff. The plaintiff, a hostler's helper in defendant's roundhouse at Sault Ste. Marie, on September 30, 1914, at about 2 p. m., left his usual place of work at the roundhouse, climbed on the rear end of the tender of an engine hauling an excursion train to the Chippewa county fair as it passed the roundhouse, rode between the tender and the mail car out to the fair, where the train remained a few minutes, then got into the cab with the engineer and fireman, and on the return trip, while the train was slowing down, opposite the roundhouse, he jumped from the engine to the ground, caught his foot in a switch stand lever, and thus sustained the injury complained of. The plaintiff had been working for the defendant about a year. His duties were to work in and around the roundhouse, and to help the hostler generally. There was no evidence that he had ever been called upon to perform any duty on engines while on the main line, or to get on or off moving trains. On the trip in question he was not asked to, and did not perform any duty or service while on the engine. It was, and is, the claim of the plaintiff that he boarded the engine in response to what he thought was a request, by a motion of the hand, and by word of mouth from the engineer, supposing there was something the engineer wanted him to do; that on the return trip the engineer promised

to "let him off" at the roundhouse, and while slowing down motioned him to get off, which he attempted to do while the train was moving at about 10 miles an hour; and that he had never had any instructions as to the proper way of getting off a moving train or engine. A careful reading of the record satisfies us that the claim and testimony of the plaintiff, not only find no support in the testimony of the other witnesses in the case, but are contradicted by the other witnesses. It clearly appears that, just before leaving the roundhouse, plaintiff said he was going to "take a look at the fair."

At the close of the testimony the defendant moved the court to direct a verdict for the defendant on the grounds:

(1) That no actionable negligence of the defendant had been shown.

(2) Because it appeared from the testimony that the plaintiff was injured while taking a trip for his own pleasure, or business, outside of the line of his employment, that he was not injured in the course of his employment, and that his own negligence in jumping from a moving engine contributed to his injury, or was the direct cause of it, and that his own contributory negligence barred his recovery.

This motion was argued and taken under advisement, and the trial court submitted the case to the jury, reserving its decision upon defendant's said motion, and the jury rendered a verdict for the plaintiff for \$2,500. Later, and after further argument of defendant's motion to direct a verdict, the court granted the motion, and directed a judgment to be entered for the defendant notwithstanding the verdict of the jury, which was done accordingly. The plaintiff has brought error.

All of the assignments of error relate to the ruling of the trial court in granting defendant's motion for a directed verdict, after the jury had returned a ver-

dict for the plaintiff, and the real issue presented is: Did the trial court err in ordering judgment entered for defendant, contrary to the verdict of the jury? In the discussion of the issue, counsel for plaintiff does not attempt to reconcile the conflict of testimony, but bases his case upon plaintiff's testimony, viewed in its most favorable aspect, and invokes the rule ordinarily applied. On the other hand, it was urged by counsel for defendant upon the argument of the motion, and is urged here, that the purpose of Act No. 217, Pub. Acts 1915, 3 Comp. Laws 1915, § 14568, being to prevent the necessity of the retrial of cases, and to avoid needless litigation, it would be absurd to hold that the court could not grant this motion, based upon lack of sufficient evidence to sustain a verdict, when upon a motion for a new trial upon the same ground the trial court would feel obliged to set aside a verdict. Counsel for defendant say:

"In the orderly course of procedure under the Empson act, if the circuit judge grants defendant's motion after verdict (as in this case), there would seem to be no time or place for a consideration of the evidence, and its weight and effect, either by the trial or appellate court, and a party must be deprived of the right to a review of the evidence as upon a motion for a new trial, unless such review and determination are permissible under the Empson act."

The learned circuit judge appears to have sustained this view of the practice. In the course of his opinion on the motion to direct a verdict he said:

"The plaintiff was hired by defendant about a year before his injuries to work as a 'hostler's' helper. The evidence in regard to his duties showed that he was to work in and around the roundhouse and assist the hostler in the discharge of his duties. He was not required to go out on the main line, or to go upon or ride upon the engines. While it is true that the evidence showed that on one occasion the plaintiff walked

along the main line to the station on some errand or another, there is no evidence, there is absolutely no evidence, that he was ever called upon to perform any duty on any engine while on the main line. There is no evidence that his duties ever required him to get on or off moving trains. On the 30th of September, 1914, the plaintiff, having finished some work he was doing inside the roundhouse, was standing in the front doorway of the roundhouse, and according to the plaintiff's claim the engineer operating the so-called 'Fair' train, running from the defendant's station in the city of Sault Ste. Marie to the fair grounds in that city, called and motioned to plaintiff to get on the engine, and that in pursuance of that invitation he boarded the train and rode out to the fair ground; that he then came down into the cab of the engine and had some conversation with the engineer about the fair, and was then asked by the engineer whether he (plaintiff) wanted to get off the engine at the station or at the roundhouse; that plaintiff replied that he wanted to get off at the roundhouse, and the engineer said he would 'let' him off at the roundhouse. Plaintiff rode back in the cab until the engine reached a point opposite to the roundhouse, when the engineer motioned him to get off, and at the same time set the brakes and the train slowed up. Plaintiff then got down onto the gangway of the engine, and without waiting for the train to stop got off the moving engine, and was seriously injured. Plaintiff claims that the circumstances under which he was motioned by the engineer to get off the engine fairly indicated to him that the engineer did not intend to stop the train, and that plaintiff was expected to get off the engine while it was still in motion, or, at least, that the subject was a question for the jury, and that the jury had a right to find that the actions and conduct of the engineer amounted to negligence, for which the defendant is responsible. Plaintiff claims he was rightly on the engine in the course of his employment, and that he was expected or required to get off the moving engine, and as the safe or proper method of getting off a moving engine was not known to him, and would not be apparent to a person of his knowledge and experience, that he was therefore entitled to warning of the

dangers thereof, and to an instruction as to the safe or proper method of getting off a moving engine. Now, the defendant claims that the plaintiff went upon the engine on the day in question to take a ride out to the fair grounds for his own pleasure and convenience. Defendant claims that the hostler told him not to go, but he persisted in going against the orders of his superior. The evidence of defendant's witnesses was to the effect that the engineer, who was on the offside of the engine from the roundhouse, did not invite and could not have invited the plaintiff to get on the engine. The fireman testified that, when the engine was passing the roundhouse, he gave the plaintiff the so-called 'high ball' sign, not as an invitation to board the engine, but simply as a mere salutation. While it may have been a question for the jury as to whether the plaintiff was on the engine in the course of his employment, as he claims, or for his own pleasure and convenience, as defendant claims, I am inclined to think that the finding by the jury in favor of the plaintiff on the proposition is supported only by a mere scintilla of the evidence. When we consider the hostler's testimony, the improbability, if not the impossibility, of the engineer having signaled the plaintiff from the other side of the engine, the fact that the engineer denied giving any such signal or invitation to plaintiff, the fireman's testimony as to the 'high ball' signal intended only as a friendly salute, the fact that plaintiff did not get on the engine, the fact that the engineer did not stop for him to get on, the fact that plaintiff was not asked to and did not perform any duty or service while on the engine, all of these facts and other circumstances uphold the theory of the defendant that the plaintiff boarded the train for the purpose of taking a look at the fair grounds, and not to perform any services in the course of his employment. A verdict to the contrary is not merely against the overwhelming weight of the evidence, but can scarcely be said to be supported by any substantial evidence. Nor do I think that there is any evidence to show that plaintiff was ever required or expected, under the duties or scope of his employment, to get on or off moving engines. I am inclined to agree with counsel for plaintiff that if the evidence, fairly consid-

ered, tended in any way to show that plaintiff, as a 'hostler's helper,' was ever required or expected to get on or off a moving engine, there would be a duty to warn and instruct, and in reaching that conclusion I am not overlooking the evidence of defendant that no such instruction as to how to get off moving engines in safety was ever given to any of its employees. But in this case the evidence is conclusive that the duties of plaintiff's employment did not require the plaintiff to get on or off a moving engine, and the defendant was not bound reasonably to anticipate that he would attempt to do so. Nor is there any evidence of any negligence on the part of the engineer. He told plaintiff that he would let him off at the roundhouse, and plaintiff could have waited, if he saw fit to do so, until the engine stopped. The circumstances do not show that the engineer peremptorily ordered him to get off the engine while it was in motion. True, the motion to get off was made by the engineer while the engine was in motion, but the plaintiff decided for himself when and where he would jump from the engine. The injury to plaintiff was therefore the result of a pure accident, for whom no one is responsible, or resulted from his own voluntary act in jumping from the engine while it was in motion. Taking the case as a whole, I am convinced that under the undisputed evidence the plaintiff is not entitled to recover. No negligence on the part of the defendant has been established. Therefore the motion to direct a verdict in favor of the defendant should have been granted. Judgment is therefore ordered in accordance with this decision, in favor of the defendant, notwithstanding the verdict."

In our opinion, by the undisputed evidence, the plaintiff was not injured in the course of his employment. The cases cited by plaintiff are readily distinguished. Neither was there any evidence of negligence on the part of defendant. There was no evidence that plaintiff was ordered to get off the moving engine. That any invitation was given by the engineer to get on the engine was negatived by the great weight of the evidence. But, if any such invitation was given, such

invitation was outside the scope of the engineer's authority. *Keating v. Railroad Co.*, 97 Mich. 154 (56 N. W. 346, 37 Am. St. Rep. 328) ; *Schulwitz v. Lumber Co.*, 126 Mich. 559 (85 N. W. 1075) ; *Mahler v. Stott*, 129 Mich. 614 (89 N. W. 340).

The defendant had not at the time of the injury come under the workmen's compensation law, and therefore the defense that plaintiff was negligent (unless such negligence was wilful) is not available to defendant. *Freeman v. Railroad Co.*, 191 Mich. 529 (158 N. W. 204). In *Lydman v. De Haas*, 185 Mich. 128 (151 N. W. 718), we held that, while Act No. 10, Extra Session 1912 (2 Comp. Laws 1915, § 5423 *et seq.*), deprives the employer who has not elected to be governed by the provisions of the law, of the defenses of contributory negligence (unless wilful), assumption of risk, and that the injury was caused by the negligence of a fellow employee, yet, in order that a plaintiff may recover, it is necessary to show that the defendant was chargeable with negligence.

This burden was not sustained by the plaintiff in the instant case, and for that reason, and because the verdict of the jury was against the great weight of the evidence, we are of opinion that the trial court did not err in its disposition of the case, and the judgment below is affirmed.

KUHN, OSTRANDER, BIRD, MOORE, STEERE, and BROOKE, JJ., concurred. PERSON, J., did not sit.

CONNOR v. McRAE.

1. APPEAL AND ERROR—TRESPASS—EVIDENCE—DAMAGES.

Where a witness was asked, on cross-examination in *trespass quare clausum*, if a good logging road cut through timber would not add to its value, and he stated that it would depend on circumstances and that he would consider it damaged to the value of the timber cut, the reply of the witness did not prejudice plaintiff and was not reversible error. Nor was it error to allow plaintiff, who was asked if he had any sinister motive, to reply that he had not. Considerable latitude is allowed on cross-examination of a party to the action to ascertain his interest, candor, etc.

2. SAME—CROSS-EXAMINATION—DISCRETION OF COURT.

The trial court did not err in refusing a request of plaintiff that under the testimony a stated quantity had been removed, estimates of the parties being contradicted and in conflict.

3. SAME—TRIAL.

That the court refused a request, which the jury's finding covered in a manner favorable to the appellant, was not a ground for reversal.

4. SAME—TRIAL—CHARGE—TREBLE DAMAGES.

No liability for treble damages arises under 3 Comp. Laws, §§ 11204, 11205, 3 Comp. Laws 1915, § 14632, if the trespass was casual and involuntary, or if the defendant had probable cause to believe that he owned the timber. *Held*, under the evidence, that the question was one for the jury.

5. SAME—TRESPASS—LOGS AND LOGGING.

And there were sufficient grounds for submitting separately two trespasses for cutting timber to the jury, to determine whether they were casual and involuntary so as to prevent liability for treble damages, where it was claimed one was where defendants had no timber and the other was in a section in which they owned a quarter section, and cut over the line.

6. NEW TRIAL—SUFFICIENCY OF AFFIDAVIT.

Affidavits of plaintiff and his attorney upon a motion for a new trial, as to what an absent witness would testify to, are insufficient, since such motion should not be granted upon hearsay testimony.

Error to Gogebic; Cooper, J. Submitted October 3, 1916. (Docket No. 20.) Decided December 21, 1916.

Trespass *quare clausum fregit* by Robert Connor and another against Hector McRae, Donald McRae, and Paul Francis for treble damages under 3 Comp. Laws, § 11204 (3 Comp. Laws 1915, § 14632). Judgment for plaintiffs for an insufficient amount. Plaintiffs bring error. Affirmed.

Herbert M. Norris, for appellants.

Van Slyck & Hall, for appellees McRae.

STONE, C. J. This is an action of trespass on land for treble damages, brought under section 11204, 3 Comp. Laws (3 Comp. Laws 1915, § 14632). The plaintiffs owned lot 1 of section 10, and the northeast quarter, the southeast quarter, and the southwest quarter of section 14 in township 50 north, range 45 west, in Gogebic county; and the defendants McRae owned section 16 and the northwest quarter of section 14 in the same township.

On October 2, 1912, the defendants McRae entered into a contract with the John Schroeder Lumber Company to sell to it the hemlock, basswood, ash, spruce, balsam, maple, birch, and cedar logs on said section 16 and the northwest quarter of section 14. The logs from section 16 were to be banked on said section, and the logs from the northwest quarter of section 14 were to be banked on section 10, on the shore of Lake Superior, and the timber was to be logged in the winter of 1912-13.

On October 7, 1912, the defendants McRae entered into a contract with the defendant Francis to cut into logs all of the timber on said northwest quarter of section 14 and the entire of section 16, and bank the same on said sections 10 and 16 on the shore of Lake Superior.

One Ira Bush was interested with the defendants McRae in the contract between them and the Schroeder Lumber Company and the Francis contract, and did the principal part of the negotiating of the two contracts. He did not own any interest in the land, but had financial interest in the net profits, which was to be one-half. This interest was confined to section 14.

Before the contract with defendant Francis was signed defendant Hector McRae and Mr. Millard, a surveyor, and defendant Francis, were on section 14 looking over the timber, and it was then known to both Mr. McRae and Mr. Francis that the lines on the east and south sides of the northwest quarter of section 14 could not be followed, but that the other lines, namely, the section lines, could be followed easily.

According to the testimony of defendant Francis, it was agreed between him and Mr. Bush at the time the contract with him was made that Mr. Millard, or some one else, would go up and run the lines some time before Francis should go to cutting. This was denied by Mr. Bush, but he did testify that after Mr. Francis got started he told Mr. Francis that, if he would let him know a few days beforehand, he would send Mr. Millard up to run the lines. He also testified on cross-examination:

"I told Mr. Francis that I wanted to run those lines, or have those lines run so that he wouldn't commit any trespass."

The defendant Francis began operations by build-

ing camps on October 17, 1912, and Mr. Millard did not run the lines on section 14 until about January 23, 1913, and after the trespass on section 14 had been committed.

Defendants McRae knew that they owned no land on section 10 where the logs were to be banked which were taken from the northwest quarter of section 14, and they never attempted to get permission to bank the logs there. Defendant Francis claimed that he supposed Mr. Bush was to arrange for banking on section 10, but Mr. Bush never arranged for banking on said section. No permission was ever given by the plaintiffs to cut any timber on their lands on section 14, or on section 10, or to bank any timber on section 10.

Before Mr. Millard came to make the survey and before the cutting, Gordon McLean, one of defendant Francis' employees, who had had some experience in running lines, ran the lines on the east and south of the northwest quarter of section 14 by stepping it off and using a pocket compass. McLean, in trying to verify his first line, ran a new line which was inside the first line and nearer to the McRae land. This was in the latter part of December and before Mr. Millard ran the lines. By cutting to the McLean inside line the defendants trespassed upon the southwest quarter of section 14, it is claimed by plaintiffs, 9 rods and 23 links south of the center post, running from there diagonally northwesterly to the southwest corner of the northwest quarter of section 14; and on the northeast quarter of the section at the eighth line it was cut for the space of 15 rods running diagonally from the eighth line northwesterly to the northeast corner of the northwest quarter of section 14, and from the eighth line southwesterly to the southeast corner of the northwest quarter of section 14, making, it is claimed, 5 acres on the north of the southwest

quarter and $7\frac{1}{2}$ acres on the west of the northeast quarter from which the timber was cut on section 14, making a total claimed by the plaintiffs of 94,560 feet, of which 82,860 was hemlock, the remainder consisting of maple, ash, basswood, and birch.

It was further claimed by the plaintiffs that the timber that was cut on the logging road of lot 1, section 10, was a total of 3,650 feet, and the estimated amount of timber cut on the landing on lot 1 of said section 10, of all kinds and sizes, was 25,000 feet, making a total trespass of 123,210 feet.

There was a conflict of testimony as to the quantity and value of this timber; but, taking the Schroeder Lumber Company's contract and the Francis contract as the basis for determining the stumpage value of the timber that was cut, the hemlock 12 to 16 feet long would be \$1.75 per thousand, and from 18 to 24 feet would be \$2.75; basswood and ash would be \$5.75, and birch would be \$2.75; maple would be \$.75, and spruce and balsam would be \$3.75.

When defendant Hector McRae's attention was called to the fact that there was a trespass on section 14, there was testimony tending to show that he said:

"I wouldn't say anything about it, they will find out soon enough about the trespass."

This was denied by the defendant Hector McRae.

The case was submitted to the jury, and they were instructed by the court that the trespass on lot 1, section 10, and on the northwest quarter of section 14 was undisputed, and that the only questions for the jury were as to the extent of such trespass and the resulting damages, and the jury were required to answer certain special questions as follows:

"Did the defendants McRae trespass casually and involuntarily on lot 1, section 10?" The answer was: "No."

"Did the defendants McRae trespass casually and involuntarily on section 14?" This was answered: "Yes."

"Was the trespass on lot 1 of section 10, casual and involuntary on the part of defendant Paul Francis?" Answer: "No."

"Was the trespass on the west half of the northeast and north half of the southwest quarter of section 14 casual and involuntary on the part of defendant Paul Francis?" The answer was: "Yes."

So that it appeared by the verdict of the jury that as to all the defendants the trespass was wilful on lot 1, section 10, and casual and involuntary as to all defendants on section 14. The jury found that the quantity of timber cut on lot 1, section 10, was 15,000 feet valued at \$2 per thousand, being \$30, which sum was trebled by the circuit court in entering judgment. The jury also found that the damage on section 14 was 8 acres at 10,000 feet per acre, or 80,000 feet in all, and that the value per 1,000 feet was \$1.75, making a total for damages on section 14 of \$140.

There was a motion for a new trial on the part of the plaintiffs based on the following reasons:

(1) Because the verdict of the jury in finding that the trespass was casual and involuntary as to section 14 was against the weight of the evidence.

(2) Because the verdict of the jury as to the amount of damages on lot 1, section 10, was inadequate and contrary to the weight of the evidence.

(3) Because the verdict as to the amount of damages on section 14 was inadequate and contrary to the weight of the evidence.

(4) Because since the trial the plaintiffs had discovered new evidence material to the issue in said cause, which was not cumulative, and which was not, and could not have been, discovered before the trial.

(5) Because the court erred in its charge to the jury on the subject of the trespass being casual and involuntary, in that the court unduly emphasized the position taken by the defendants, and because the court refused to give plaintiffs' requests to charge,

and because the charge of the court as given would lead the jury to believe that in order to find that the trespass was not casual and involuntary there must be proof that defendants cut timber of plaintiffs, knowing the same to be plaintiffs' land, and that they should not take into consideration the facts shown by plaintiffs as sufficient, if the jury believed them, to warrant them in finding that the trespass was not casual and involuntary.

The motion for a new trial was denied, and reasons therefor were stated in writing by the circuit judge. These were duly excepted to, and the questions involved were raised. The plaintiffs have brought the case here upon writ of error. There is a large number of assignments of error. Seven of them relate to alleged errors in the rulings of the trial court in the admission of evidence; ten of them relate to the refusals of the trial court to charge the jury as requested by plaintiffs' counsel; six of them relate to the charge of the court as given; and the remainder relate to the questions raised by the motion for a new trial and reasons given for refusing the same.

The case was submitted to this court upon briefs, and the assignments of error relied upon by the plaintiffs were as follows:

Second assignment of error: In the cross-examination of the plaintiff's witness Harris, he was asked the following question:

"Now, a good logging road that is built down through a creek bottom, through a tract of timber, adds to the value of it, instead of depreciating the value; isn't that a fact?"

This was objected to on the ground that it was incompetent, irrelevant, and immaterial. The court permitted the question to be answered, and the plaintiffs duly excepted. The answer was:

"That would depend upon circumstances and whether the prospective landowner intended to log his land

and how he intended to log it. It would also depend on whether there was a good logging road there or a poor one."

The third assignment of error relates to the same subject, and the question arose in the cross-examination of the same witness where he was asked the following:

"If you were sent out by your principal, Mr. Connor, to look over a tract of timber owned by Mr. Norris with the view of purchasing it to operate next winter, and you found right down through the center of that timber a good, wide logging road cut through, would you tell Mr. Connor that, in your opinion, it was a damage to the tract or a benefit?"

The same objection, ruling, and exception. The witness answered:

"I should tell my employer or whoever I was looking over that land for that the damage to that land would be the amount of the value of the timber that had been cut in the logging road, and I would expect him to pay for it."

It is the claim of the appellees that under the holding of this court in *Burtraw v. Clark*, 103 Mich. 383 (61 N. W. 552), the ruling of the court was not erroneous. That was trespass for digging a drain, and defendant sought to show that the drain was a benefit, and it was held the defendant was entitled to make the showing. Whether erroneous or not, we are satisfied from the perusal of the record, and in view of the answers to the questions, that the rulings were not prejudicial to the plaintiffs; and the case should not be reversed unless it be found there was prejudicial error in the rulings of the court.

The fourth assignment of error relates to the question asked the plaintiff Robert Connor upon his cross-examination:

"Q. Did you have any sinister motive in wishing to prevent those boys from transporting this timber out to the shore of Lake Superior?

"A. What is that?

"Q. Did you have any sinister motive? Did you want to harass them or prevent them from marketing their timber?

"A. No."

An exception was taken to these questions. The answers to these questions being in the negative, we do not see how the plaintiffs were prejudiced thereby, and we think there is no merit in this assignment of error. This witness was one of the plaintiffs, and considerable latitude should be allowed in the cross-examination of a party to ascertain whether his testimony was affected by his interest.

The remaining assignments of error relating to admission of testimony, we think, do not require discussion.

The ninth assignment of error is based upon the refusal of the court to charge the jury as requested as follows:

"I charge you that, under the undisputed evidence in this case, there was a trespass committed by the defendants in this case upon the lands of the plaintiffs, being the west half of the northeast quarter and the north half of the southwest quarter of section 14 and lot 1 of section 10 in township 50 north of range 45 west, not only by the cutting and destroying of the timber, but also by the carrying away of the timber, that, under the undisputed evidence, timber to a considerable amount was cut upon said lands, and the same was carried away and converted by the defendants McRae to their own use by the sale thereof, and that because of this plaintiffs are entitled to recover against the defendants the value of the timber so cut, destroyed, and carried away. The evidence is undisputed that the timber which was so cut, destroyed, and carried away was made up of hemlock, maple, ash, basswood, birch, and cedar, and I charge you

that, under the evidence in this case, there was on section 14, 82,860 feet of hemlock, 830 feet of maple, 2,780 feet of ash, 7,710 feet of basswood, and 380 feet of birch, and that on section 10 there was 2,090 feet of hemlock, 340 feet of maple, 120 feet of ash, 120 feet of basswood, 170 feet of birch, and 810 feet of cedar, and that in addition to this on section 10 and on what is termed the landing there was an estimated destruction of timber to the amount of 25,000 feet composed of hemlock, birch, and cedar."

We have stated that the court charged the jury that under the undisputed evidence there was a trespass committed by the defendants upon the lands of the plaintiffs, leaving the amount of the trespass to be ascertained from the evidence. The request above set forth embraces the testimony of the plaintiffs' witness Harris, who made an estimate of the timber taken from section 14 and lot 1 of section 10. The record shows that this testimony was not based upon an actual measurement of the timber cut and taken away from the plaintiffs' lands. It consisted of an estimate by the witness on section 14, made by a measurement of the stumps and estimated length of the trees cut, in connection with an examination and measurement of their tops, making certain allowances for the jump of trees in falling; and this, at best, was but an estimate of the witness of the quantity of timber taken. It is no answer to say that it was the best evidence that could be produced upon the subject. There was other testimony tending to contradict the conclusions and estimate made by this witness, and we do not think that the court would have been warranted in giving this estimate to the jury as undisputed evidence of quantity in the case. The extent of the trespass on lot 1 of section 10 was still more inconclusive. The distance was about 40 rods from the lake shore to the boundary of lot 1 of section 10, over which the road was cut. A similar estimate was there made, and

the quantity on the logging road ascertained was 3,650 feet. At the landing the timber had been cut away, many of the stumps dug up and removed, many of them not found, the quantity of land there, being about two acres, was ascertained by pacing, and the quantity of timber taken was estimated by comparison with other timber growing in the vicinity. This landing was near the mouth of the creek. The witnesses who examined it had never been there before, and had no knowledge of the quantity of timber originally standing thereon, and it was a matter of judgment only as to whether the amount of the timber there originally standing could be ascertained by comparison with other timber standing in the vicinity. Whether the standing timber was uniform in that vicinity was a question upon which the witnesses did not agree. We think the court did not err in refusing to give this request to the jury. The court did call the attention of the jury to all the evidence in the case upon the subject.

The remaining requests to charge relate to the subject whether this trespass was casual and involuntary, and the attention of the jury was challenged to certain testimony introduced by the plaintiffs in the case upon that subject. Some of the requests refer specifically to section 10. As the finding of the jury was that the trespass upon section 10 was not casual and involuntary, but wilful, manifestly the plaintiffs were not prejudiced by the refusal to give these requests. Those relating to section 14 were refused by the court largely upon the ground that they laid special stress upon particular evidence and were argumentative, as stated by the court in its reasons for refusing to grant a new trial. The charge of the court followed very closely the law as laid down by this court in *Michigan Land & Iron Co. v. Deer Lake Co.*, 60 Mich. 143 (27 N. W. 10, 1 Am. St. Rep. 491). This is conceded by plain-

tiffs' counsel, but it is contended that the case just referred to is not the law upon the subject at the present time, and that the correct rule is that stated in *Longyear v. Gregory*, 110 Mich. 277 (68 N. W. 116), and *Bockes v. A. McAfee & Son Co.*, 165 Mich. 7 (130 N. W. 313). A perusal of the charge, as given, satisfies us that the case was properly submitted to the jury upon all these questions. The court charged the jury, among other things, as follows:

"The burden of proof in this case is upon the plaintiffs to maintain their cause of action by a fair preponderance of the evidence. As I have said, there are some undisputed questions of fact. In view of the undisputed questions of fact, it becomes your duty to find a verdict in favor of these plaintiffs. The only question upon that point is as to the amount of damages; that is a disputed question of fact to be determined by you. There is a dispute in the evidence here as to what the damage is that these plaintiffs sustained. You will take all the evidence in the case and consider it fairly and dispassionately and arrive at your verdict as to what this testimony shows by a fair preponderance of the evidence is the amount of damage which these plaintiffs have sustained by reason of the trespass which the undisputed evidence in this case shows has been committed on the lands in question.
* * *

"I charge you that, in determining the question of whether the trespass was casual and involuntary, this is an affirmative defense, and the burden of proof shifts to the defendants to show by a fair preponderance of the evidence that such trespass was casual and involuntary. * * *

"I charge you there must be some evidence in the case of wilfulness, wantonness, or evil design on the part of any defendant held liable under the statute for treble damages; that is, in order to hold that such trespass was not casual and involuntary, there must be some evidence in the case of wilfulness, wantonness or evil design upon the part of any defendant so held. In order to so hold defendants McRae for treble damages there must be evidence of wilfulness, wanton-

ness or evil design upon the part of such defendants; and also in order to so hold defendant Francis there must be evidence of wilfulness, wantonness, or evil design upon the part of defendant Francis. Negligence alone is not sufficient to create liability in a case of this kind. Even if the defendants were negligent, that alone would not be sufficient to make them liable for treble damages; there must be active misconduct.

"Now, gentlemen, it appears from the evidence in this case that the trespass upon section 14 was committed while defendants McRae were logging the northwest quarter of section 14 in question, and that they had let a contract to defendant Francis to do this logging. The defendant Francis went there and started to do the logging in question, and it appears that while doing that logging on the portion of section 14 that he was to do the logging upon he went over the line and trespassed upon the land which belongs to the plaintiffs in section 14. In this connection I charge you that in trespassing upon the lands of plaintiffs in section 14, if defendant Francis honestly believed he was on the lands of defendants McRae, then he cannot be held liable for treble damages for such trespass, nor can the defendants McRae be held liable for treble damages if they honestly believed that defendant Francis was cutting upon their lands. * * * All of the defendants deny that they wilfully or intentionally committed any trespass. * * * It will be for you, under all the circumstances as disclosed by the testimony in this case, to arrive at your verdict and conclusion as to whether or not the defendants McRae or the defendant Francis, or either of them—whether or not this trespass so far as it applies to them was casual and involuntary. You will take into consideration all of the testimony introduced upon that subject, gentlemen, and considering that testimony fairly and dispassionately, decide for yourselves whether or not the defendants McRae have by a fair preponderance of the evidence shown that the trespass which was committed was casual and involuntary on their parts, and also, with regard to Mr. Francis, you will consider all of the testimony and arrive at your conclusion as to whether or not the trespass which

was committed was casual and involuntary on the part of Mr. Francis."

We are of opinion that the charge of the court was warranted by the decision of this court in *Michigan Land & Iron Co. v. Deer Lake Co.*, *supra*, and that the rule stated in that case has not been departed from by this court.

The case of *Longyear v. Gregory*, *supra*, was peculiar in its facts and circumstances. There the defendants, having a contract to lumber the southeast quarter of the northeast quarter of section 8 in a certain township, which it will be observed was a single 40, cut the timber not only upon that forty, but also from the southwest quarter of the northeast quarter, which belonged to the plaintiffs. It was very apparent to the court in that case that having permission to cut upon 40 acres of land gave them no right to cut over 80 acres of land, and that they must have known that they were exceeding the acreage to which they were entitled, and this court said:

"Not only did the defendants cut the timber from the southwest quarter of the northeast quarter, which belonged to the plaintiffs, but they also cut it from the southeast quarter of the northeast quarter. An inspection of their bill of sale would have indicated to them that they had no right to cut the timber from both of these 40's. Neither would it require a great amount of experience in the woods to indicate they had no right to cut over 80 acres of land when they had title to but 40 acres. The record also discloses that when Mr. Lewis, acting for the plaintiffs, visited them, a large quantity of posts cut from this land were still on the land; other portions of the timber were near by, on an adjoining description; and, after they knew the title to the lumber and timber was not in them, the defendants shipped it away, and appropriated the proceeds to their own use. It cannot be the law that no degree of care is required of one who goes on land to cut timber, or that he may recklessly, and without trying to ascertain the facts, cut and

carry away timber, and then say that the owner, who may have wanted to keep his timber, must content himself by receiving as his damages only what the timber was worth on the land. It was to meet such cases as the one at issue that the statute was passed."

In the instant case the defendants owned and had a right to cut upon the northwest quarter of section 14. By reason of the lines not being extended upon the east and south of this quarter section, and after making certain measurements by way of survey, they proceeded to cut, and in doing so cut over the lines upon the east and south. We think that under the evidence and questions submitted to the jury it was for them to say whether the trespass upon section 14 was casual and involuntary, or that the defendants had probable cause to believe that the land on which such trespass was committed was their own under the provisions of section 11205, 3 Comp. Laws (3 Comp. Laws 1915, § 13375).

Complaint is made by appellants because the court submitted the trespass on lot 1, section 10, and that on section 14 separately, and that one rule should govern the entire trespass. We think there was no error here. The defendants never claimed any rights on section 10. They knew they owned no timber there. While on section 14 they did own a quarter section. We think that the court properly submitted that question.

We agree with the circuit judge wherein he states in his reasons for refusing to grant a new trial that:

"The verdict was not against the weight of the evidence in any particular, either as to the trespass upon section 14 or in any other manner. The amount of the verdict upon each item was sustained by evidence in the case. This applies to the entire trespass. The newly discovered evidence is in no manner sufficient to justify the granting of a new trial."

It is a sufficient answer to the question of newly

discovered evidence to say that the affidavit of the proposed absent witness William J. Weston was not produced. As to what he would have testified to upon a new trial the court was not informed except by hearsay. The affidavit of Mr. Weston was not furnished in support of the motion, but merely the affidavits of the plaintiff and their counsel. They are hearsay, and were not proper affidavits on which to base an order for a new trial. *Hammond v. Pullman*, 129 Mich. 567-569 (89 N. W. 358).

An examination of the entire record in this case leads us to the conclusion that there was no prejudicial error upon the trial of the case, and for that reason the judgment of the court below should be and is affirmed.

KUHN, OSTRANDER, BIRD, MOORE, STEERE, and BROOKE, JJ., concurred. PERSON, J., did not sit.

MYERS v. MUSKEGON IMPROVEMENT CO.

1. LIMITATION OF ACTIONS—BILLS AND NOTES—EVIDENCE—INDORSEMENT OF PAYMENTS.

To establish that an indorser of a promissory note consented to indorsements of small payments that were made through one of his firm, who were attorneys for the holder, it was not essential to prove his actual words or to show his consent in writing, but the consent and authority might be implied from his relations, circumstances and other facts having a bearing.

2. SAME—KNOWLEDGE—PAYMENTS.

And the tolling of the statute of limitations was not ap-

plicable, nor did the statute cease to run, where another indorser was under obligations to apply payments on the collateral security to satisfy the note, but failed to carry out the obligation during part of the time: it could not be said that the indorsers were voluntary trustees so as to interrupt the operation of limitation of action. The cause of action would be barred two years after it was discovered, under 3 Comp. Laws 1915, § 12330, relating to causes of action fraudulently concealed.

Error to Muskegon; Sullivan, J. Submitted October 18, 1916. (Docket No. 123.) Decided December 21, 1916.

Assumpsit by Henry E. Myers and Edwin F. Holmes, administrators of the estate of John L. Woods, deceased, against the Muskegon Improvement Company, George L. Erwin and others upon a promissory note. Judgment for defendants. Plaintiffs bring error. Affirmed.

Clapperton, Owen & Hatten (Stephen H. Clink, of counsel), for appellants.

Hatch, McAllister & Raymond, for appellee Raymond.

STONE, C. J. This is the third appearance of this case in this court. It was begun by declaration filed March 24, 1908. When here first, it was reported in 169 Mich. 689 (135 N. W. 949), and the second time in *Myers v. Erwin*, 180 Mich. 469 (147 N. W. 458). A reference to those opinions will render an extended statement of the case here unnecessary.

It is the claim of the defendant George L. Erwin, who alone defends in this case, that there is only one question involved in this appeal, and that is whether the payments on May 19, 1902, of \$50, on February 20, 1904, of \$82.23, and on December 20, 1905, of \$15,

prevented the running of the statute of limitations as to the defendant, and it is claimed that, if none of these payments prevented the running of the statute of limitations as to him, the note is barred, since all the other payments were made more than six years before the commencement of the suit, and the statute of limitations was duly pleaded, and it is said that these payments would not keep the cause of action alive, unless they were made under such circumstances as to raise an implied promise on the part of George L. Erwin to pay the debt; that these payments were all made by David D. Erwin with money received for and upon the release of lots from the mortgages held as collateral to the note sued upon, and it is urged that George L. Erwin, as only one of two or more joint contractors, would not lose the benefit of the statute of limitations, so as to be chargeable by reason only of any payment made by any other or others of the joint contractors—citing 3 Comp. Laws, § 9745 (3 Comp. Laws 1915, § 12336), 5 How. Stat. [2d Ed.] § 14152.

The plaintiffs claim that, *first*, the defendant should be held to be equitably estopped from insisting upon his plea of the statute of limitations by reason of the confidential relations existing between the executors of the estate and David D. Erwin, who was acting for all of the defendants in the matter; and also, *second*, that the payments made upon the note by David D. Erwin, which he received from the collateral, should, under the circumstances of this case, be held to constitute a new promise, thus preventing the running of the statute. When this case was first before this court, plaintiffs asserted that the payments made upon the note by David D. Erwin, being the last three, of \$50, \$82.23, and \$15 respectively, which he received from the collaterals, should, under the circumstances of the

case, be held to constitute a new promise, thus preventing the running of the statute of limitations.

Upon the first trial in the court below, upon findings of the court, judgment had been entered for the defendants. This court held that, upon the record as it stood then, without the testimony of Thomas Hume or of the defendant George L. Erwin, the collateral notes and mortgages were originally given to George L. Erwin, trustee, for the five individuals who signed the note in suit, and he assigned them to John L. Woods; that the property, for which the notes and mortgages were given, was the property of the five men, including this defendant; that the notes and mortgages themselves, though standing in the name of George L. Erwin, trustee, actually belonged to the same individuals; and that, subject to the assignment to Woods as collateral, they still owned them, so that, when any money was collected from any of them, it belonged to the five makers of the note, subject to the duty to pay it over to Woods, by reason of the assignments to him. After setting forth the circumstances relating to the payment of the Shaw Electric Crane Company notes and mortgage, and the substitution of the Mason mortgage therefor, Justice BROOKE, speaking for the court, said:

"Under these circumstances, we are disposed to hold that when, on April 22, 1901, David D. Erwin collected from one of the mortgages, which he and his four associates owned subject to the assignment as collateral to Woods, and forwarded the same to the executors to be applied upon the note, said payment should be considered as a voluntary admission by the defendants that the debt was then due, from which a new promise can and should be implied. At that time no payments had been made upon the note for nearly five years, but the correspondence shows that during the period frequent inquiries were made by and on behalf of the executors, which were responded to by David D. Erwin. On February 20, 1904, the firm of Smith, Nims, Hoyt & Erwin, by David D. Erwin, re-

mitted to the executors a further sum of \$82.23, collected from the same source, which was duly credited upon the note."

The opinion concludes in this language:

"Our conclusion that the later payments indorsed upon the note (made under the circumstances indicated) serve to prevent the running of the statute renders it unnecessary to discuss the plaintiffs' first proposition."

That proposition was that the defendants should be held to be equitably estopped from insisting upon their plea of the statute of limitations by reason of the confidential relations existing between the executors of the estate and David D. Erwin, who was acting for all of the defendants in the matter.

When the case came before this court the second time from a directed verdict and judgment for plaintiffs, the record contained the testimony of George L. Erwin for the first time, and we held that that introduced into the case evidence of certain new facts, namely:

"That he was never a member of, nor connected with, the law firm of which David D. Erwin and F. A. Nims were members, and knew nothing about their transactions with John L. Woods, whom witness had never seen and did not know personally; that the Muskegon Improvement Company failed, turned over all its remaining property to trustees, held no more meetings, and went out of business in 1894, at which time he severed his connection with the concern; that he had been absent from Muskegon most of the time for 12 or 13 years and supposed the improvement company's matters were all closed up; that he had no interest in the collateral given to secure the note in question, nor in any surplus which might arise therefrom after such note was paid; that he had no knowledge David D. Erwin made any collections on such collateral, or any payments on said note subsequent

to 1894, and had never, directly or indirectly, authorized or consented to the payments in question."

Justice STEERE, writing the opinion, which was concurred in by all of the Justices, said:

"These were statements of fact not in the previous record. If they are true, the payments in question, made by David D. Erwin without appellant's knowledge or consent, would not deprive the latter of claiming the benefit of the statute of limitations, which by his plea he has sought refuge under [citing the statute and decisions of this court]. There is evidence in this record, some of it documentary, tending to negative appellant's testimony, but the conflicting testimony raised issues of fact in the case which were not for the court to decide in a jury trial, and which should have been submitted to the jury under appropriate instructions as to their legal significance and directions as to what verdict should be rendered according as the jury might determine the facts."

And the judgment below was reversed and a new trial granted. The case has been again tried on substantially the same evidence and submitted to a jury, which returned a verdict for the defendant George L. Erwin, he alone contesting on that trial, and a judgment was entered accordingly.

A careful perusal of both of the opinions above referred to will show that the question whether the defendants should be held to be equitably estopped from insisting upon their plea of the statute of limitations, or whether there was any fraud, of which this defendant had notice, in dealing with the Shaw Electric Crane Company mortgage and notes, has never been disposed of by this court. Justice STEERE, in the course of his opinion, simply disposed of the question whether, in view of the testimony of George L. Erwin, the payments made by David D. Erwin were binding upon George L. Erwin, and did not deal with the question of confidential relations or fraud.

Aside from the three assignments of error which relate to the admission of certain testimony, against the objection and exception of the plaintiffs, which we do not think of sufficient importance to discuss, the remaining assignments of error relate to the failure to direct a verdict, and to give certain requests of plaintiffs to charge, and to the charge of the court.

A motion was made at the close of the evidence on the part of the plaintiffs for the direction of a verdict in their behalf, based upon the transactions connected with the Shaw Electric Crane Company mortgage and notes, to the effect that the defendant and his associates, after the assignment of that mortgage as collateral to secure the payment of the note sued upon, collected considerable sums of money upon the notes of the Shaw Electric Crane Company, as appears by the books of the company, and that the testimony was undisputed that that money came into the hands of the defendant, and that no application was ever made of those moneys except as to one note; that those moneys, when the defendant and his associates collected them, were the moneys of John L. Woods; that when the defendant and his associates took those moneys into their hands in 1892 and 1893, and held them without application upon the principal note, they became the trustees of that fund in law, and that they have continued to hold it as such; that such moneys in their hands constituted a voluntary trust against which the statute of limitations did not run. This motion was denied, and exception duly taken, and the ruling is made the basis of the seventh assignment of error.

The court was requested to instruct the jury as follows:

"(1) I charge you as matter of law that if, after the assignment of the Shaw Electric Crane Company mortgage to John L. Woods as collateral security for

the payment of the note in question in this suit, the defendant and his associates collected payments from the Shaw Electric Crane Company thereon, it was the duty of the defendant and his associates to apply the same as payment upon the note in suit, and if such moneys were not so applied, but were retained by the defendant and his associates, and by them converted to their own use, the law will regard the defendant and his associates as trustees, and that such trust is a voluntary one, and the statute of limitations does not run in the case of a voluntary trust until the same is declared, or notice thereof given to the party to be affected, and in a suit like this the law will apply such moneys to the payment of the note in suit, at any date that it is found in the hands of the defendant, as equity and justice and fair dealing may require, and when such moneys are so applied in this suit, such application will prevent the running of the statute of limitations, so as to bar a recovery.'

"(2) 'I charge you as matter of law that, under the undisputed facts established by the proofs in this case, your verdict must be for the plaintiff for the amount of the note of \$5,000 and interest thereon.'

"If the foregoing are refused, then the plaintiff requests that the following may be given:

"(3) 'I charge you as matter of law that it is not necessary, in order to show that George L. Erwin authorized and consented to the indorsements in question upon this note, to prove that he in words stated to anybody that he authorized it, or that he in words or writing stated that he consented to it. But the fact of his consent and authorization may be inferred by you from his relations to the business, from his conduct in connection therewith, from the character of his relations with his associates, and from all of the facts and circumstances in connection therewith as shown by the testimony in the case, if you believe that they warrant and justify that conclusion on your part.'

"(4) 'It is your duty, in deciding the matters submitted to you by the court, to consider fully and fairly all of the testimony allowed to be introduced by the court, including that which is documentary, and give it such credit and force and effect as you believe that it is entitled to.'

"(5) I charge you as matter of law that, if the defendant George L. Erwin did know, or had good reason to know, that the payments in question were indorsed upon this note, and did not raise any objection, but acquiesced therein, that that is the equivalent of consent and authorization, and that he is, if you find such to be the fact, liable upon his indorsement, and your verdict should be for the plaintiff.'"

Upon that branch of the case relating to the payments of \$50, \$82.23, and \$15, above referred to, an examination of the charge of the court satisfies us that the case was properly submitted to the jury.

The third request was given in full. The fourth and fifth requests were given in substance, and we do not think the plaintiffs were entitled to have the second request given. Neither do we think that the trial court erred in refusing to give the first request to charge. Had the payment of the Shaw Electric Crane Company notes been applied upon the note in suit, and had the same been reported and forwarded to the plaintiffs in 1892 and 1893, when collected, as plaintiffs claim should have been done, that would not have prevented running of the statute, for those notes were paid to defendants long before the payments that were reported and held to imply a new promise. In a suitable action, brought within two years after the plaintiffs discovered that they had a cause of action for the moneys so collected and converted, under the provisions of section 9739, 3 Comp. Laws (3 Comp. Laws 1915, § 12330), the plaintiffs might have recovered the amount of the two notes collected by defendants and not reported and paid over. But that is not this action. This is a suit upon the original note given by the defendants to Woods, and not for the moneys claimed to have been collected and wrongfully converted by them.

We do not think that the cases cited by plaintiffs' counsel sustain their contention. The one claimed to be most in point is that of *In re Lowerre*, in surrogate's court, reported in 48 Misc. Rep. 317, 96 N. Y. Supp. 764. There a mortgagor gave to an attorney money to pay a mortgage to a third person. The attorney receiving the money converted it to his own use, and for years continued to pay interest to the mortgagee. It was held that he became the attorney for the mortgagor, and, having misapplied the money, became indebted to him in the amount thereof, and, on the death of both, the executors of the mortgagor were creditors, and entitled to maintain a proceeding for the sale of the attorney's real estate to pay the debt, and that, the attorney having paid interest on the mortgage debt, such payment of interest prevented the statute of limitations from running on the mortgage debt, and on the claim against the attorney's estate for the conversion of the money, and was an acknowledgment on his part of the debt. The fact that the attorney had continued to pay the interest yearly to the mortgagee was the controlling fact in the case, and that in our opinion distinguishes it from the instant case.

It will be noted that there was no motion for a new trial, and the question whether the verdict was against the weight of the evidence is not before us.

Finding no reversible error in the record, the judgment below is affirmed.

KUHN, OSTRANDER, BIRD, MOORE, STEERE, and BROOKE, JJ., concurred. PERSON, J., did not sit.

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ABANDONMENT—See HOMESTEADS (1).

ABSENCE OF COUNSEL—See TRIAL (12).

ABSOLUTE DIVORCE—See DIVORCE (9).

ACCEPTANCE—See CONTRACTS.

ACCIDENT—See MASTER AND SERVANT (8, 18, 20).

ACCOUNT—See EXECUTORS AND ADMINISTRATORS.

ACCOUNTING—See EQUITY (4).

ACTION.

1. It is settled practice in this State that a plaintiff may join all of his causes of action in one declaration and have them all tried in one suit, if in separate suits he could recover on each, in the same form of action. *McDonald v. Hall*, 50.
2. Where money has been paid or goods delivered in pursuance of a contract that is immoral or criminal, or in violation of a statutory provision, and the parties are in *pari delicto* and *particeps criminis*, the court will leave them where they have placed themselves; but where a party has been fraudulently misled, and the fraudulent misrepresentations are intended to create, and actually do create, in his mind a belief that, under the circumstances represented, the act which he is induced to do is neither illegal nor immoral, he may recover the damages he has sustained notwithstanding a statute makes the act a criminal offense. *Id.* 51.

See MALICIOUS PROSECUTION (1); WATERS AND WATERCOURSES (3).

ACTION, CONDITION FOR—See FORCIBLE ENTRY AND DETAINER (1).

ACTION FOR FREIGHT CHARGES—See CARRIERS (3).

ACT OF BANKRUPTCY—See BANKRUPTCY (2).

ADEQUATE REMEDY AT LAW—See INJUNCTION (1).

ADJOINING LANDOWNERS—See NEGLIGENCE (7).

ADJOURNMENT.

Defendant's case was originally set down for trial at a date named, and was thereafter called a day earlier upon less than 24 hours' notification. After the selection of a jury, which took half a day, defendant's attorney applied for an adjournment until the following morning to enable one of the chief witnesses for the defendant to be secured, who lived in another State, and who could not be present in time to testify unless the court should grant the adjournment. There was testimony tending to show a vigorous effort to get the witness. *Held*, that the right was improperly refused and the court should have granted the application. *Dering v. Railway*, 238.

ADMIRALTY.

1. In cases of tort, the test by which to determine whether the wrongful act is one of admiralty cognizance, is locality. *Gordon v. Drake*, 64.
2. Where the tort originates upon the water, but is consummated upon the land, it is not within the admiralty jurisdiction. *Id.*
3. So, where plaintiff was injured by being crushed between the pier and a launch on which he was a passenger, while jumping ashore at the command of the master of the boat, the circuit court, and not the Federal court, had jurisdiction of the action for damages against the owners of the launch. *Id.*

ADMISSIONS—See CARRIERS (12); EVIDENCE (6); FIRES (2-4).

ADVERSE POSSESSION.

1. It is the general rule that use by permission of a private way cannot convert it into a public way. *Galinski v. City of Detroit*, 184.
2. Where a city lot has not been occupied by any one, and has been used by adjoining owners as a court, and improved as such, with the apparent acquiescence of the original owners, there has been no such actual possession by the original owners or their grantees as to establish title by adverse possession as against a city claiming under a sale for city taxes. *Id.*
3. Adverse possession of a strip of ground lying adjacent to plaintiff's lot was not established by testimony showing the construction of a crooked fence, claimed to be nearly on the line, and that disappeared in less than the fifteen-year period. *Austin v. Crowell*, 296.
4. Where the trial judge instructed the jury, in a somewhat lengthy charge, that the defense of adverse possession had not been sufficiently proved, and did not leave the question to them, but thereafter again discussed the ques-

ADVERSE POSSESSION—Continued.

tion, while the instruction may have been somewhat misleading, the court could not say the charge was so erroneous as to require a reversal of a judgment for plaintiff. *Id.*

See EJECTMENT (2).

ADVICE OF PROSECUTING ATTORNEY—See MALICIOUS PROSECUTION (1).

AFFIDAVITS—See DIVORCE (1-4); FALSE IMPRISONMENT; NEW TRIAL (2, 3).

AGED PASSENGERS—See CARRIERS (4).

AGENCY—See PRINCIPAL AND AGENT.

AGREEMENT FOR COMPENSATION—See MASTER AND SERVANT (3).

ALIGHTING FROM CAR—See CARRIERS (4, 12, 14).

ALLEGATIONS—See PLEADING (3).

AMBIGUOUS AWARD—See MASTER AND SERVANT (12).

AMENDMENTS.

When the amendment of a notice of payment was unnecessary the court did not commit reversible error in allowing defendant to correct it. *Prussia v. Bailey*, 77.

See DIVORCE (7); EQUITY (1, 3); FIRES (5); PLEADING (9).

AMOUNT DUE—See INSURANCE (3).

AMOUNT OF CLAIM—See FIRES (4).

AMOUNT OF TAX—See TAXATION (3).

ANIMALS—See EVIDENCE (9); MASTER AND SERVANT (9).

APPEAL AND ERROR.

1. Where the trial court denied the motion for a new trial without filing his reasons therefor, and no request was made to give them, his action in denying the motion cannot be reviewed in this court. *Gordon v. Drake*, 64.
2. Assignments of error should not be too general. *Collin v. Kittelberger*, 134.
3. On objection by defendant's counsel to a statement of plaintiff's counsel to the jury, not supported by the testimony, counsel not asking for or getting a ruling, the court will not review it. *Id.*
4. Upon appeal from a directed verdict, plaintiff is entitled to have his testimony viewed most favorably to himself, but he is not entitled to a construction of it opposed to its reasonable significance. *White v. McKenzie*, 189.

APPEAL AND ERROR—Continued.

5. Where no objection was made in the court below that the cause of the injury in the related case was hearsay, and no motion to strike for that reason was made, the judgment will not be reversed for such alleged error, raised for the first time in this court. *Robbins v. Magoon & Kimball Co.*, 201.
6. Where relator's petition for mandamus represented that a transcript of testimony was delivered to relator's attorney in September, 1915, when he was sick, and that the judge, who was not a regular incumbent of that circuit, had not sat as circuit judge for the trial of causes since a date specified, that was in fact incorrect, and where relator claimed that he obtained a stay and stipulation extending the time to settle a bill of exceptions, but did not serve a proposed record until the fifth month thereafter, with notice of settlement thirty days later, and a motion to extend the time was denied because untimely made, the refusal of the application was not reversible in a mandamus proceeding, and the order did not constitute an abuse of the judge's discretion. *Lavigne v. Circuit Judge*, 416.
7. A question asked of defendant's claim agent, whether or not he had been authorized to settle the case, was clearly incompetent. But where the court charged the jury that the remark of counsel was not for their consideration and that the matter of compromise could not be considered at all, the court on error would not hold the error prejudicial, especially when the question was not answered. *Norris v. Railway*, 578.
8. The court, furthermore, will not reverse a case on error for argument of counsel not shown by the record but presented by affidavits, the trial court returning that he did not so understand the alleged objectionable argument. *Id.* 579.
9. Where a witness was asked, on cross-examination in *trespass quare clausum*, if a good logging road cut through timber would not add to its value, and he stated that it would depend on circumstances and that he would consider it damaged to the value of the timber cut, the reply of the witness did not prejudice plaintiff and was not reversible error. Nor was it error to allow plaintiff, who was asked if he had any sinister motive, to reply that he had not. Considerable latitude is allowed on cross-examination of a party to the action to ascertain his interest, candor, etc. *Connor v. McRae*, 682.
10. The trial court did not err in refusing a request of plaintiff that under the testimony a stated quantity had been removed, estimates of the parties being contradicted and in conflict. *Id.*
11. That the court refused a request, which the jury's finding

APPEAL AND ERROR—Continued.

covered in a manner favorable to the appellant, was not a ground for reversal. *Id.*

See ADVERSE POSSESSION (4); CRIMINAL LAW (4, 6); NEGLIGENCE (9); TRIAL (4).

APPEARANCE—See DIVORCE (1, 6).

APPORTIONING NEGLIGENCE—See CARRIERS (11).

ARGUMENT OF COUNSEL—See APPEAL AND ERROR (8); CRIMINAL LAW (8); TRIAL (9).

ARREST—See FALSE IMPRISONMENT; MALICIOUS PROSECUTION (1).

ASSAULT AND BATTERY—See PLEADING (5).

ASSIGNMENT.

The assignee of a mortgage, which was executed by a corporation to a majority stockholder, and assigned as collateral security to another stockholder, who had notice or knowledge of the facts, did not stand in a better position than the mortgagee. *Osborn v. Detroit Kraut Co.*, 664.

See FRAUDULENT CONVEYANCES (8); VENDOR AND PURCHASER (4).

ASSIGNMENTS FOR BENEFIT OF CREDITORS—See ESTATES OF DECEDENTS.

ASSIGNMENTS OF ERROR—See APPEAL AND ERROR (2).

ASSUMPTION OF RISK— See MASTER AND SERVANT (9); RAILROADS (6, 7).

ATTORNEY AND CLIENT—See DURESS (2).

AUTOMOBILES.

1. Where the death of plaintiff's decedent was caused by defendant's automobile while it was being driven by the minor son of the owner, without his knowledge or authority, defendant was not responsible on the theory that he had knowledge of the son's incompetency and was chargeable with having allowed the son to operate a dangerous agency, nor did the fact that defendant owned the car furnish any presumption of liability. *Johnston v. Cornelius*, 115.
2. To create a liability the act must have been within the scope of the son's employment and in conducting what was properly the father's business. *Id.*
3. The trial court did not commit error in directing a verdict in favor of the father, at the close of the plaintiff's case, or discharging the jury which disagreed as to the other defendant, and was authorized to enter an order describ-

AUTOMOBILES—Continued.

ing the proceeding as a verdict for the party in whose favor the direction was given. *Id.*

4. Where the testimony of the son was somewhat contradictory and tended to impeach him, but, leaving it out of consideration, there was no evidence of an agency, the court did not err in holding that the owner was not liable for a death arising while the car was being used by the minor son. *Id.*

See EVIDENCE (6-8); STREET RAILWAYS (1, 2).

BANKRUPTCY.

1. Where the directors of a corporation had indorsed notes to several banks and, after finding their corporation was hopelessly insolvent, tried to realize on the quick assets to pay off the notes, deposits made with this purpose in view and to the knowledge of defendant, could not be retained and set off by the bank against the insolvent's notes, which proceeding would amount to a preference, in violation of 30 U. S. Stat. 565, U. S. Comp. Stat. 1913, § 9652. *Johnson v. Bank*, 452.
2. The decision of the referee, confirmed by the court, in a bankruptcy proceeding contested by the bankrupt, that the same was insolvent and had made preferential payments, is conclusive and cannot be collaterally attacked by creditors of the bankrupt or by his trustee. *Id.*
3. The court did not err in permitting part of the bankruptcy proceedings to be read before the jury, later instructing them that the subject matter complained about was governed by the record and it could not be taken into consideration except as the court advised them. *Id.*
4. Evidence that the assets of the bankrupt had been materially reduced by damage caused by a cyclone a few months before the adjudication of bankruptcy was properly excluded by the court, as the question of solvency was foreclosed by the judgment in bankruptcy, and the trial court so ruled. *Id.*
5. Plaintiff, a creditor, who agreed with a bankrupt to indorse the latter's note for enough to cover a proposed settlement with creditors, if the insolvent would pay his claim in full, could not recover on the contract, which is of a class declared fraudulent and void by the bankruptcy act. *Lieblein v. George*, 462.
6. In the absence of a new consideration the promise was void, being based on a mere assurance of payment. *Id.*

See CRIMINAL LAW (19).

BANKRUPTCY ACT—See CRIMINAL LAW (7).

BANKS AND BANKING—See BANKRUPTCY (1); MUNICIPAL CORPORATIONS (2); PARTNERSHIP.

- BASIS OF AWARD**—See **MASTER AND SERVANT** (6).
- BATTLE CREEK CHARTER**—See **MUNICIPAL CORPORATIONS** (1).
- BIAS OF JUDGE**—See **CRIMINAL LAW** (16).
- BILL OF COMPLAINT**—See **EQUITY** (4, 12).
- BILL OF EXCEPTIONS**—See **APPEAL AND ERROR** (6).
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- BILL OF PARTICULARS**—See **CRIMINAL LAW** (18).
- BILLS AND NOTES**—See **EVIDENCE** (2, 3, 11); **LIMITATION OF ACTIONS** (2, 4); **SALES** (4).
- "BLUE SKY LAW"**—See **SALES** (2, 3).
- BOARDING TRAIN**—See **CARRIERS** (7, 8).
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- BONDS**—See **MUNICIPAL CORPORATIONS** (2, 3).
- BOOKS**—See **TRIAL** (4).
- BOUNDARY LINES**—See **ADVERSE POSSESSION** (3).
- BREACH OF COVENANT**—See **SALES** (1); **VENDOR AND PURCHASER** (1).
- BREACH OF DUTY**—See **EQUITY** (8).
- BREACH OF WARRANTY**—See **SALES** (4, 5).
- BROKERS.**

1. Act No. 238, Pub. Acts 1913, 3 Comp. Laws 1915, § 11981, requiring contracts for the commissions of a broker to be in writing, did not affect pre-existing agreements. *Collin v. Kittelberger*, 134.
2. In a suit for broker's commissions where the agents did not secure a purchaser at the price stipulated in their contract, but secured a prospective buyer that finally took the property at a lower price during the life of the contract, *held*, that the evidence did not warrant the court in directing a verdict for defendant; that the question, under conflicting proofs, was for the jury. *Warren v. Vandervelde*, 164.
3. A real estate broker, who secured a purchaser for a parcel of realty which the several owners did not employ plaintiff to sell, was not entitled to maintain an action for his commissions against one of them who represented, as he claimed, that she had absolute power to dispose of the land, and the court did not commit error in directing a verdict against the agent for the reason assigned that he was a mere volunteer and there was no competent proof

BROKERS—Continued.

of misrepresentation, which, in part, rested upon hearsay. *Dickinson v. Hanley*, 585.

4. Evidence held, to be insufficient to support a charge of fraud. *Id.* 586.

See FRAUDS, STATUTE OF; TRIAL (5).

BUILDING RESTRICTIONS—See VENDOR AND PURCHASER (1, 3).

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CANCELLATION OF INSTRUMENTS—See EQUITY (12); FRAUDULENT CONVEYANCES (6, 7).

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CAPIAS AD RESPONDENDUM—See FALSE IMPRISONMENT.

CARRIERS.

1. It was lawful for a carrier to agree with the shipper, at the time of receiving the goods, that the carrier would collect the freight from the consignee. *King v. Van Slack*, 105.
2. Upon shipment of goods through a carrier to a third party, and a delivery to the shipper of the bill of lading, the consignee is *prima facie* the owner of the property. *Id.*
3. Where defendants shipped goods under an agreement with the carrier and the consignee that the freight charges should be paid by the consignee, and the goods were delivered and the charges demanded collected, the consignee, and not the shippers, became liable for the difference between the amount demanded and the true legal rate. *Id.*
4. The authorities are uniform in holding that aged or infirm passengers are entitled to more attention and care from the carrier than others and the carrier is bound to exercise a degree of care commensurate with their condition or infirmities. *Steketee v. Waters*, 177.
5. Held, under the testimony in plaintiff's behalf, in an action for defendants' failure to help plaintiff from the car, in a duly careful manner, that the determination of the jury that defendants were negligent is sustained. *Id.*
6. Where plaintiff did not inform defendant's servants that she was an invalid and would require a stool to step on in alighting from the train, until she stood on the bottom step of the car, ready to alight, it cannot be said that she was guilty of contributory negligence, as matter of law, even though she was familiar with the conditions at the depot. *Id.*
7. Where plaintiff brought an action against defendant railway company for injuries sustained by him in attempting

CARRIERS—Continued.

- to board the train, after alighting at what he supposed was his destination, the evidence which was held in a previous opinion in the same cause to have presented a question of fact upon the issue of negligence, was, on the second trial, properly left to the jury: the first decision was rightly treated as the law of the case, at the retrial. *Foley v. Railway Co.*, 233.
8. In a personal injury case against a carrier for negligence in failing to allow sufficient time for boarding a train, the court was not in error in charging that the jury might consider the interest of the witnesses of the parties, their bias, prejudices, etc., as it is always proper to consider the interest or bias that any witness might have. *Id.* 234.
 9. Defendant was an interstate carrier engaged in business between the States. Plaintiff was employed by the railroad company, at repairing lines of telegraph and telephone and was a lineman of experience. At the time he was hurt he was one of a gang which repaired lines and was employed at new construction work. While erecting new wires at the yard in Michigan City, Indiana, to connect with another route or line, he received a severe shock and was burned by reason of a contact between the telegraph wire of defendant and a trolley wire. *Held*, that plaintiff was employed in interstate service and was included within the provisions of the employers' liability act, 35 U. S. Stat. 65, and that there was evidence in plaintiff's behalf which presented a question for the jury. *Collins v. Railroad Co.*, 303.
 10. And though plaintiff's fellow servant denied that he allowed the wire to slacken and strike the power wire, the question remained one of fact, under evidence tending to show the slackening of the wire. *Id.*
 11. Instructions of the court to the jury, in substance, that plaintiff was entitled to such sum as would make him good, reducing the amount found due in proportion to the degree of neglect of which he might be found guilty, correctly stated the measure of damages and the rule of apportionment. *Id.*
 12. Where plaintiff claimed, in a personal injury claim, that he was thrown to the ground by the starting of defendant's car as he was in the act of alighting, and his testimony was disputed by evidence of his admissions, and by his assertions on cross-examination, inconsistent with his claims on direct examination, it was proper to leave to the jury his claim that the car started quickly and unexpectedly while he was descending from the step. *Tuttle v. Railway Co.*, 390.
 13. It was a question of fact for the jury to determine the matter of plaintiff's credibility; the burden resting on him

CARRIERS—Continued.

to establish his freedom from contributory negligence did not change the rule. *Id.* 391.

14. Passengers are entitled to a reasonable time in which to get off after the car has stopped; the duty of the carrier is not discharged until the passenger, alighting with reasonable expedition and exercising due care, with sufficient time to exercise it, is free from the car. *Id.*
15. *Held*, that the questions of negligence and contributory negligence were properly submitted to the jury and the verdict was not excessive. *Id.*
16. Where plaintiff's decedent was killed while riding on the platform of a street car that was crowded with passengers, and was jarred or crowded out of an open door, he was riding on the platform by permission, as it was necessarily contemplated that when the inside was filled to capacity passengers should stand on the platform, if taken on and accepted as such, and the swerve or jerk of the car, the lurching of the crowd against the decedent and open door may be said to have combined to cause the accident. *Larskowski v. Railway*, 409.
17. While the lurching of the car was the immediate cause of the injury, the accident was the result of the concurring conditions, defendant's negligent failure to close the door, and the lurching, combined. Defendant was liable if it negligently left the door open and thereby aided in bringing about the death of its passenger. *Id.*
18. In the absence of any rule of the railway company, or ordinance requiring the doors to be closed on the car, since decedent was riding on the platform by permission, and by implied invitation, considering the crowded condition of the street car, he was not guilty of contributory negligence. *Id.* 410.
19. Carrying an excess of passengers and permitting them to stand on platform and steps is evidence of negligence. *Id.*
20. A person accepted as a passenger and required or permitted to ride on the platform of a street car is not as a matter of law negligent, relieving the company from liability except from gross or wilful negligence. The questions of negligence of defendant in leaving open the door and plaintiff's contributory negligence were for the jury. *Id.*

See DAMAGES (2); RAILROADS (4).

CERTAINTY—See PLEADING (1, 5).

CERTIFICATE OF MEMBERSHIP—See PARTNERSHIP.

CERTIORARI—See PLEADING (8).

- CESSATION OF EMPLOYMENT—See MASTER AND SERVANT (22).
- CHANGES AFTER ACCIDENT—See ELECTRICITY (3).
- CHARGES—See TELEGRAPHS AND TELEPHONES (6).
- CHARTERS—See MUNICIPAL CORPORATIONS (1).
- CHATTEL MORTGAGES—See MALICIOUS PROSECUTION.
- CHECKS—See MASTER AND SERVANT (14).
- CIRCUIT COURT COMMISSIONER—See FORCIBLE ENTRY AND
DETAINER (1, 3).
- CIRCUIT COURT RULE—See TRIAL (11).
- CIRCUMSTANTIAL EVIDENCE—See WILLS (6).
- CITIES—See MUNICIPAL CORPORATIONS (1).
- CLASS LEGISLATION—See CONSTITUTIONAL LAW (1).
- CLEAN HANDS—See VENDOR AND PURCHASER (5).
- COERCION—See PERJURY (4).
- COLLATERAL ISSUE—See ELECTRICITY (5).
- COLLISIONS—See STREET RAILWAYS (3).
- COMMENCEMENT OF SUIT—See DIVORCE (1).
- COMMISSIONS—See BROKERS (1-3); FRAUDS, STATUTE OF; MU-
NICIPAL CORPORATIONS (2-4); TRIAL (5).
- COMMON USE—See NEGLIGENCE (2).
- COMPENSATION—See EXECUTORS AND ADMINISTRATORS; MASTER
AND SERVANT (3, 9).
- COMPETENCY—See CRIMINAL LAW (12); WILLS (3).
- COMPOSITION—See BANKRUPTCY (6).
- COMPROMISE AND SETTLEMENT—See APPEAL AND ERROR
(7); FIRES (2-4).
- CONCLUSION—See MASTER AND SERVANT (15).
- CONCLUSIVENESS OF ALLOWANCE OF ANNUAL ACCOUNT
—See EXECUTORS AND ADMINISTRATORS.
- CONCURRING CAUSES—See CARRIERS (17).
- CONDUCT OF COURT—See CRIMINAL LAW (11).
- CONJECTURE—See MASTER AND SERVANT (10); NEGLIGENCE (5).
- CONSIDERATION—See FRAUDULENT CONVEYANCES (1, 5).
- CONSPIRACY—See CRIMINAL LAW (20, 22, 24).

CONSTITUTIONAL LAW.

1. The provisions of Act No. 174, Pub. Acts 1915, 2 Comp. Laws 1915, §§ 5767-5780, providing for the establishment of a teachers' pension fund, and providing for contributions from the compensation of those who are actively engaged in their employment to maintain it, are not class legislation, and are not in violation of the Constitution, because the classification of teachers as one employment is reasonable and justifiable; whether such contract will encourage or promote education is a matter for the legislature to determine; any legislation that affects the qualifications, period of service, or reward of teachers acts upon this class. *Attorney General v. Connolly*, 499.
2. While the statute affects contributions from teachers, the salaries to be paid constitute a net amount, and the act takes nothing from any one, hence, does not trespass upon the due process prohibition of the Constitutions. *Id.*
3. The objection that it is a fund that belongs under the Constitution to the school districts and cannot be taken by the State for a pension fund is untenable as a ground of the invalidity; and whether or not the act effects inequality in contributions by different districts, it is not a reason for holding the law void, as the rule which requires uniformity in taxation does not apply to such districts. *Id.*
4. The general effect and purpose of the act is not to authorize the expenditure of public money for a private purpose, nor does it award extra compensation to a public agent as forbidden by section 3, Art. 16, of the Constitution. *Id.*
5. Act No. 174, Pub. Acts 1915, 2 Comp. Laws 1915, § 5767 *et seq.*, creating pensions for teachers, does not violate the section of the Constitution prohibiting extra compensation to public officials and servants, the statute extending similar inducements to teachers already employed and to those who enter public service subject to the pension provisions. Nor does section 14 violate the Constitution, Art. 5, § 30, in that the act does not apply to Detroit until the local retirement fund is discontinued: the general purpose and phraseology of the legislation brings it within the legislative authority. *Id.*

See TELEGRAPHS AND TELEPHONES (2).

CONSTITUTIONAL PRIVILEGE—See CRIMINAL LAW (6).

CONSTRUCTION OF STATUTE—See INJUNCTION (2).

CONTEST OF WILLS—See WILLS (1).

CONTRACTS.

The question being whether or not a contract exists and the evidence conflicting, a question for the jury is presented: and plaintiff, who forwarded to defendant a contract calling for a quantity of poles, which defendant

CONTRACTS—Continued.

signed, but added after the quantity indicated the words "more or less," which contract plaintiff later signed, striking out the word "less," did not thereby accept the proposal or do more than make a series of offers. *W. C. Sterling & Sons v. Watson & Bennett Co.*, 11.

See BROKERS (1-3); CARRIERS (1); CONSTITUTIONAL LAW (1); DURESS (1-3); FRAUDS, STATUTE OF (2); FRAUDULENT CONVEYANCES (1); MASTER AND SERVANT (14, 17); MUNICIPAL CORPORATIONS (3); SALES (6); TRIAL (5, 7); VENDOR AND PURCHASER (6, 7).

CONTRIBUTORY NEGLIGENCE—See CARRIERS (6, 13, 15, 18, 20); ELECTRICITY (1); NEGLIGENCE (4); RAILROADS (1, 3); STREET RAILWAYS (1, 9).

CONVEYANCE TO TRUSTEE—See EQUITY (8).

CORPORATIONS—See ASSIGNMENT; CRIMINAL LAW (20, 23); EQUITY (12); FRAUDULENT CONVEYANCES (5-9); MASTER AND SERVANT (15, 17); SALES (2).

CORPUS DELICTI—See CRIMINAL LAW (10).

CORRESPONDENCE—See EVIDENCE (1); TRIAL (1).

COUNTS—See PLEADING (3-6, 8).

COURSE OF EMPLOYMENT—See MASTER AND SERVANT (26).

COURTS—See AUTOMOBILES (3); CRIMINAL LAW (16); EQUITY (11).

COVENANTS—See VENDOR AND PURCHASER (2).

COVERTURE—See DURESS (4).

CREATION OF ESTATES BY ENTIRETY—See HOMESTEADS (3).

CREDITORS' SUIT—See EQUITY (12).

CRIMINAL ACTS—See ACTION (2).

CRIMINAL LAW.

1. No objection can be made to a grand jury, or to any member thereof, except for reasons specified in the statute. 3 Comp. Laws, § 11881, 3 Comp. Laws 1915, § 15708. *People v. Lay*, 17.
2. A prosecutor is one who prefers an accusation against a party whom he suspects to be guilty. *Id.*
3. Where a plea to an indictment in a criminal case charged that one of the grand jurors was disqualified from sitting on the jury because he had been a Federal official in a prosecution in which respondent was indicted, and which

CRIMINAL LAW—Continued.

- involved the same state of facts, and that he acted as a stenographer in taking testimony before the referee in bankruptcy in a related cause, and that the testimony so taken was read from the juror's minutes before the grand jury which returned the indictment, the averment was duplicitous in so far as the pleader may have intended to charge that the indictment was founded upon incompetent testimony, and the mere fact that incompetent testimony was received and considered was not fatal, unless it was the only testimony considered: the juror was not a prosecutor in the sense which would disqualify him to sit. *Id.* 18.
4. A matter urged as an objection to the validity of the action of such grand jury in returning an indictment, aside from the provisions relating to the competency of grand jurors, cannot be considered on a motion to quash. *Id.*
 5. Upon reviewing the testimony claimed by respondent to have been insufficient, the verdict of the jury, in a prosecution for embezzlement from a private corporation of which respondent was vice president and a director, is held to have been justified by evidence tending to show an offense, though denied by the accused. *Id.*
 6. That the respondent was summoned by the grand jury to give testimony before it, appeared and testified, and, lacking advice of counsel, did not know what questions he was privileged to refuse to answer, was not a ground to quash the indictment; the evidence was given by him without objection, and hence might properly be considered by the jury. *Id.*
 7. But no testimony given in bankruptcy proceedings by the respondent should have been received in the trial of the prosecution against him, officers of a bankrupt corporation being within the privilege of 30 U. S. Stat. 548, U. S. Comp. Stat. 1913, § 9591. *Id.*
 8. Improper argument of counsel for the prosecution that the respondent and other witnesses had failed to testify, was a proper subject of criticism, and constituted reversible error. See 3 Comp. Laws, § 10211, 3 Comp. Laws 1915, § 12552. *Id.* 19.
 9. It is competent for the prosecution to prove material contradictory statements of a witness who appears to be hostile, and whom the law compels the prosecutor to call as one of the eyewitnesses, or persons having knowledge of the circumstances, for the purpose of affecting his credibility. *People v. Lahnala*, 144.
 10. Where respondent, a colored man, was convicted of the murder of an eight-year-old girl, whose body he cremated in the furnace of a manufacturing plant, of which he was in charge as a porter or caretaker, and at the trial his

CRIMINAL LAW—Continued.

attorney objected to the order of proof because the *corpus delicti* should be first established, the conviction was not subject to reversal for the reason that some of the testimony given by various witnesses might have been presented in different order, involving the recalling of some of them at a later time, in the absence of prejudice to the accused. *People v. Kimbrough*, 330.

11. During a controversy between counsel and the court relative to the admission of certain testimony in the order in which it was offered, the court did not commit reversible error by restricting the remarks of respondent's attorney or criticizing him for exceeding the limitations of propriety, etc. *Id.*
12. Although the trial court could exercise his discretion by allowing a cross-examination out of order of a witness who testified that he was a professor of anatomy in a reputable university, and allow an investigation into the qualifications of witness, it was not a matter of right and the refusal of permission to examine him concerning his qualifications was not error. *Id.*
13. The objection that respondent was asked about other felonies concerning which he insisted upon giving numerous details, and the results of the prosecution, was not well taken; respondent having offered himself as a witness, thereby subjecting himself to the same cross-examination as any other witness. *Id.*
14. The absence of the circuit judge from the bench during the arguments of the respective attorneys for the State and for respondent was not a reason for awarding a new trial when the court was in his room leading into the court room and was able to and did hear the arguments and re-entered the court room immediately if any objection or controversy arose, unless some showing of prejudice or harmful result was made. *Id.*
15. Nor was the fact that several physicians were invited by the sheriff to attend the examination of a medical expert, and were invited to take chairs within the railing, an adequate ground for reversal, the court returning that at various times during the trial chairs were brought inside the rail for the use of the spectators: the management of this feature of the trial was within the discretion of the trial court. *Id.* 331.
16. A party who interposes a dilatory plea in a prosecution for a criminal offense invites the most rigid scrutiny of its sufficiency, under the well established rules of pleading; and, therefore, a plea in abatement to an indictment for embezzlement, which pleaded the fact that the circuit judge had been employed as an attorney by some of the creditors of the corporation, of which respondent was

CRIMINAL LAW—Continued.

one of the vice presidents, and was pecuniarily interested in the result of the prosecution, was not sufficient, where the evidence showed that the relation between the judge and the creditors had terminated before he called the grand jury, since the indictment does not place the respondent in jeopardy, but is preliminary to the hearing: also, under the statutes of Michigan, the accused is limited to the one ground of objection, viz., that some one summoned to serve is prosecutor or complainant against him. *People v. Lay*, 476.

17. And where the circuit judge, who was later called to hear the case, was incapacitated by a similar disqualification, but the presiding judge overruled the motion for a change of venue, calling in another circuit judge to hear the case on the merits, the accused waived any right to object to having the judge act as substitute in arguing the plea without objection before him. *Id.* 477.
18. Where a bill of particulars was filed in a criminal proceeding covering the embezzlement of \$12,000 of so-called salary, and also covering a further embezzlement of \$25,000 for another year, but the trial proceeded throughout in relation to the year 1913, when he received the larger amount of salary, a request to instruct the jury that no claim was made under the bill of particulars for the \$25,000 salary, and the evidence about the same could only be considered as bearing on his intent in receiving the \$12,000, was correctly refused, for the reason that it was not presented until after the arguments were completed and the case had been tried and argued on a contrary theory. *Id.*
19. While testimony in a criminal prosecution, showing the sworn statements of respondent upon examination in bankruptcy proceedings of the corporation of which he was an officer, should have been excluded because it was privileged, it could not be said to have prejudiced the accused who afterwards went on the stand and gave testimony relative to the same facts. *Id.*
20. Under a charge that respondent and other officers of a corporation had conspired together to wrongfully and secretly convert to their own use funds of the corporation, in form of excessive salaries, the evidence showing the taking of the money, and that it was authorized by the conspiring officials, and they, with accused, were in control of the corporate funds, presented an issue which the court rightly submitted to the jury. *Id.*
21. And upon proofs that respondent received a large and unauthorized salary, which was charged on the books to a fictitious account, the court was right in charging the jury that the object of introducing evidence about the fictitious account was to show that the true account of the money which respondent received was secreted, but

CRIMINAL LAW—Continued.

the evidence could not be considered unless the jury also found that the money was so charged with the knowledge and consent of respondent, or with the knowledge and consent of others with whom he was knowingly co-operating in committing the offense. *Id.* 478.

22. Where two or more conspire together to commit an actionable wrong everything said, done, or written by any one of them in the execution or furtherance of the common purpose is deemed to be said, done, or written by everyone, and is a relevant fact as against each. *Id.*
23. But evidence as to insolvency of the corporation stood upon a different footing: though respondent joined in a report of its annual condition to the State, showing serious impairment of the capital, the report was not conclusive, when he denied knowing its contents and claimed he had not read it and did not know of the alleged insolvent condition. *Id.*
24. And where the court charged that if the jury found the corporation was insolvent when his salary was increased, that was not to be considered as indicating bad faith unless he knew of the condition, or unless others with whom he was acting in concert knew of the insolvency, the error was prejudicial and reversible, and it was improper to permit the jury to consider the knowledge of the other conspirators as proof of the motive and intent of the accused. *Id.*

See EVIDENCE (5); PERJURY (1, 2, 4); WORDS AND PHRASES.

CROSS-EXAMINATION—See APPEAL AND ERROR (10); CRIMINAL LAW (12, 13); EVIDENCE (12); TRIAL (1, 4, 7).

CROSSING ACCIDENTS—See RAILROADS (1); STREET RAILWAYS (1).

CROSSING SIGNALS—See RAILROADS (2).

CUMULATIVE EVIDENCE—See NEW TRIAL (2).

CURING ERROR—See TRIAL (9).

DAMAGES.

1. Where a verdict was found for plaintiff, who charged that defendant negligently drove his automobile against plaintiff, and the plaintiff therefore was held not guilty of contributory negligence, and where plaintiff, who was a music teacher, was injured so that she was unable to follow her profession as a teacher of music for about six months, six cents damages was inadequate and contrary to the weight of the evidence, requiring a new trial in plaintiff's behalf, on error. *Walker v. Britton*, 174.
2. The trial court did not err in charging the jury, in a suit

DAMAGES—Continued.

brought by a passenger who was injured in attempting to board defendant's train, that it was the duty of the jury to allow plaintiff such sum as would compensate plaintiff for his injuries, limited or defined by a detailed statement of the different elements to be considered, and was not too broad or comprehensive. *Foley v. Railway Co.*, 234.

3. Where plaintiff secured a judgment for \$1,000, which was not an unreasonable amount for personal injuries that she suffered in alighting from one of the cars of a street railway corporation, and, except in her pleading, there was no apparent claim of damages for permanent injuries, the court would not say, as a matter of law, that it was reversible error to refuse defendant's request to charge that there was no evidence of any injury for which damages could be awarded as for permanent injuries. *Jozefiak v. Railway*, 318.

4. Future damages are limited to such as the evidence makes reasonably certain will necessarily result from the injury sustained, and it was error to advise the jury that they might award such sum as would compensate plaintiff for the injuries she would be likely to suffer in the future. *Norris v. Railway*, 579.

See ACTION (2); APPEAL AND ERROR (9); CARRIERS (11); EVIDENCE (12, 15); TRESPASS (1); WATERS AND WATERCOURSES (4, 6).

DAMAGES IN CONTEMPLATION OF WRONGDOER — See WATERS AND WATERCOURSES (5).

DEATH—See AUTOMOBILES (1, 4).

DEBTOR AND CREDITOR—See FRAUDULENT CONVEYANCES (9); HOMESTEADS (1).

DECLARATION—See PLEADING (1).

DEDICATION—See EQUITY (2).

DEEDS—See VENDOR AND PURCHASER (7).

DEFAULT—See NEW TRIAL (1).

DEFECTIVE CLAIM—See MECHANIC'S LIENS (1).

DEFECTIVE INSTRUMENTALITY—See MASTER AND SERVANT (21).

DEFECTS—See RAILROADS (4).

DEFENSES—See EQUITY (10); MASTER AND SERVANT (9).

DEMURRER—See PLEADING (7, 8).

DEMURRER TO EVIDENCE—See TRIAL (3).

DEPOSITS—See BANKRUPTCY (1).

DESCRIPTION—See VENDOR AND PURCHASER (6).

DESTROYED WILL—See WILLS (7).

DILIGENCE—See NEW TRIAL (2).

DIRECTED VERDICT—See APPEAL AND ERROR (4); AUTOMOBILES (3); BROKERS (2); ELECTRICITY (1); EVIDENCE (2, 8); MALICIOUS PROSECUTION (3); MASTER AND SERVANT (7, 13); SALES (4); STREET RAILWAYS (1, 9); TRIAL (3).

DISCONTINUANCE—See TRIAL (3).

DISCRETION OF COURT—See APPEAL AND ERROR (10); DIVORCE (7, 8); PLEADING (9).

DISCRIMINATION—See TELEGRAPHS AND TELEPHONES (3).

DISQUALIFICATION OF JUDGE—See CRIMINAL LAW (17).

DIVORCE.

1. In a suit for divorce, in which the complainant filed an affidavit of nonresidence that was sworn to on the day preceding commencement of the cause, the court could not properly decline to issue an order for appearance for the alleged reason that the affidavit should have been made after the commencement of suit, although the order must not be made until after the suit is commenced. 1 Comp. Laws, § 485, as amended (3 Comp. Laws 1915, § 12449). *Clarke v. Circuit Judge*, 33.
2. A purported affidavit, on which perjury could not be assigned if it was wilfully false, would not, in law, be an affidavit at all. *Id.*
3. As a general rule an affidavit should be entitled in the suit in which it is to be used. If there be no suit pending at the time, it should not be entitled. It was formerly held if a suit was pending and the affidavit was entitled in a suit not pending, it was a nullity. *Id.*
4. That the affidavit was entitled in the contemplated suit was not a sufficient reason for treating it as invalid. It was made to be used in the suit, and was so used, and perjury could be assigned upon the statements made therein, if false. 3 Comp. Laws, § 11306, 3 Comp. Laws 1915, § 14973. *Id.*
5. Evidence in a suit for divorce, *held*, to sustain a decree for plaintiff on the grounds of extreme cruelty and profanity in the presence of the wife and children. *Cole v. Cole*, 655.
6. Failure to serve a subpoena on the prosecuting attorney and his non-appearance in court did not affect the jurisdiction and were mere irregularities. *Id.*

DIVORCE—Continued.

7. A wide discretion is vested in courts of chancery to allow amendments to a bill to conform to the proofs taken. *Id.*
8. And, *held*, that such discretion was not abused in refusing defendant's request to open the case for further proofs, on the showing made, under Act No. 314, Pub. Acts 1915, 3 Comp. Laws 1915, § 12478. *Id.*
9. Under Act No. 324, Pub. Acts 1907, the court did not err in granting a decree of absolute divorce, upon testimony which entitled plaintiff to the same, and that, though the prayer was for separate maintenance, no reference being made in the pleadings to 3 Comp. Laws 1915, § 11399. The subject is one for the discretion of the court below. *Id.*

DOWER.

Since the inchoate right of dower is not such an estate as gives the possessor a different title or estate than that of her husband, the dower right merged in an estate by the entirety, which was created without her joinder. Where dower and fee combine in the same person dower merges in the greater estate. *Weaver v. Michello*, 572.

DRUNKENNESS—See EVIDENCE (13).**DUE PROCESS OF LAW—See CONSTITUTIONAL LAW (2); TELEGRAPHS AND TELEPHONES (2).****DUES—See INSURANCE (1).****DUPLICITOUS PLEADING—See CRIMINAL LAW (3).****DURESS.**

1. Where plaintiff brought suit against defendants to recover a payment alleged to have been made under threat of litigation for the debts of a banking copartnership, for which she was not liable, on account of coverture, testimony relating to the environment of the plaintiff, and that she supported herself and her children, whose number and age she described, was not improperly admitted. *Welch v. Beeching*, 338.
2. An attorney for defendant, who started the action for equal share of the proceeds, was correctly made a party defendant and the court rightly declined to direct a verdict for him. *Id.*
3. Duress exists where one by the unlawful act of another is induced to make a contract or perform some act under circumstances which deprive him of the exercise of free will: it may be defined as an unlawful restraint, intimidation, or compulsion resulting in the doing of some act contrary to the will or inclination of the doer. *Id.*

DURESS—Continued.

4. And although defendant and his attorney may have supposed they were entitled to start the action, they were not excused from liability to a woman, away from home, sick or indisposed, threatened and informed by the lawyer that the law would be invoked against her if she did not pay the claim, and who paid under the fear excited by the threats. *Id.*

See PERJURY (4).

DUTY TO LICENSEE—See MASTER AND SERVANT (23).

DUTY TO REPAIR—See NEGLIGENCE (2).

EJECTMENT.

1. In an action of ejectment affecting a parcel of land, part of which was located in the rear or back yards of certain tenant houses, rented and occupied by lessees of defendant, who claimed no interest in the property except as tenants of the defendant, the persons in occupancy were not necessary parties. *Austin v. Crowell*, 296.
2. A defendant in ejectment cannot, for the purpose of defeating the action, rely upon the nonjoinder as defendant of any person occupying the premises with him under a claim of right subordinate to, or inseparable from, his own possession. *Id.*

See FORCIBLE ENTRY AND DETAINER (3).

ELECTRICITY.

1. Plaintiff brought case against the village of Portland and the Citizens' Telephone Company for injuries received by her in attempting to rescue her infant son, less than ten years of age, from contact with a live wire. Defendant village operated a plant for lighting used for municipal electrical service, both public and private. Plaintiff charged lack of support and insecure fastening of the telephone wire, and lack of proper guards or insulation, and that the telephone wires during a storm sagged and came in contact with the heavily charged wires of the village of Portland, and that one of the wires, which broke off, was allowed to hang down for a long time in a very dangerous condition on a public thoroughfare. *Held*, on a review of the testimony, that the questions of negligence and contributory negligence were for the jury, and the court properly declined to direct a verdict for either defendant. *Sykes v. Village of Portland*, 86.
2. The opinion of an expert on the subject that the distance between the wires was dangerous and the wires would not be safe unless placed about 40 inches apart was admissible over the objection that it involved the question for the jury to pass upon. *Id.*

ELECTRICITY—Continued.

3. Testimony that after the accident the telephone wires had been fixed so the two could not come together, offered to show that whatever marks appeared on the light wires were made before the injury and to show that the wires were not afterwards affected, *held*, to be proper for the indicated purpose and that it could not be excluded because it was incompetent for another purpose. *Id.*
4. It was also permissible to show, by the testimony of experienced witnesses, that a person might get a shock sufficient to knock him down without burning him, amplified by the cross-examination of another witness along similar lines. *Id.*
5. It was, however, erroneous to receive evidence of an inexperienced electrical worker as to his individual experience under dissimilar conditions, since it tended to raise a collateral issue. *Id.* 87.

See CARRIERS (9).

EMBEZZLEMENT—See CRIMINAL LAW (5, 16, 18, 20).

EMINENT DOMAIN—See STREET RAILWAYS (5); TELEGRAPHS AND TELEPHONES (2).

ENTITLING AFFIDAVITS—See DIVORCE (3, 4).

EQUITY.

1. A minor who purchased a parcel of land in the name of his mother and later sold the premises to third parties was not a proper party complainant in a suit to enjoin the closing of a street which the owners had represented to him was dedicated or open to the public. But since an amendment would have been proper on motion or objection, the court on appeal will treat the same as having been done, no harm resulting to defendant from treating the amendment as made. *Babcock v. Heenan*, 229.
2. After making representations concerning the opening or dedication of a street, the owners could not later change their intention to dedicate, to the injury of one who purchased adjoining property in reliance on the existence of the street, or as to his grantee or vendee. *Id.*
3. The erroneous description of the town or range in which a parcel was situated could be and was rightly amended on the hearing, when the error was merely technical and not prejudicial to appellants. *Id.*
4. It was not a ground of objection to a bill of complaint, filed against a decedent's estate, for an accounting and the allowance of a note against the estate and to set aside a deed of trust property by a trustee defendant, that it was multifarious, where all the defendants were interested, though separately, or in different degrees, as to the subject-matter of the controversy. *Buck v. Lockwood*, 242.

EQUITY—Continued.

5. One who purchased from a trustee for creditors under a written instrument of trust with full notice of the facts and source of the title, could not question the jurisdiction of the court of equity, under a bill of complaint filed to set aside the transfer and enforce complainant's rights under the trust instrument. *Id.*
6. The probate court having jurisdiction of an estate of a decedent has no power to determine the question of who should pay any deficiency that might remain after applying the proceeds of a trust assignment to the satisfaction of debts owing by the deceased or to adjudicate the rights of the trustee, beneficiary and *cestui que trust*, and purchaser at trustee sale; it was a proper subject for the court of equity in the county in which real property included in the trust was located; and the court properly determined the question of deficiency and whether the promissory note of decedent, which the real estate was transferred to secure, was given for the alleged purposes. *Id.*
7. The jurisdiction of probate courts was meant to be exclusive, except as the court of chancery, in special cases, might render them aid or assistance, by means of auxiliary remedies as might be needful to prevent wrong and injustice, in cases where the probate jurisdiction may be rendered effectual. *Id.* 243.
8. Where the trustee for the benefit of creditors of an assignor was charged with wrongfully conveying the trust property to a third person, who it was understood should reconvey to the trustee, the court of equity had jurisdiction, if the trust could not be enforced without its aid, and the complexity of the various claims of the interested persons required equitable cognizance. *Id.*
9. The judgment of the probate court, not on the merits of such suit, but in effect determining that the note of decedent, presented against the estate, was not a claim against his estate, and there was no liability thereof to the trustee, was not conclusive of the issues raised by a bill of complaint to enforce the trust and determine the liability for a deficiency of the estate. *Id.*
10. Because there was no charge of fraud in the pleadings, and the parties appeared, or were found, to have acted in good faith, did not preclude relief, and the right to relief did not depend on the bad faith of the trustee, whose conveyance contrary to the terms of his trust could be set aside, though executed in good faith. *Id.*
11. But the circuit court of Ionia county could not assume jurisdiction to pass on deeds given by decedent in Ingham county, which did not relate to the primary issues in the chancery case in the former county, though it had authority to pass on the deficiency and accounting, and to pass

EQUITY—Continued.

on the values of real and personal property of the decedent. The subject-matter being purely local, the court of the county in which the real property was situated alone had jurisdiction. *Id.*

12. Averments of complainant's bill to follow corporate property and in the nature of a creditor's suit that a mortgage from defendant corporation to one of its stockholders was void, justified the admission of evidence that the corporation was not indebted to the mortgagee. *Osborn v. Detroit Kraut Co.*, 664.

See **PARTNERSHIP; VENDOR AND PURCHASER** (5).

ERROR OF JUDGMENT—See **MASTER AND SERVANT** (1).

ESTATES—See **DOWER**.

ESTATES BY ENTIRETY—See **DOWER; HOMESTEADS** (3).

ESTATES OF DECEDENTS.

An administrator who is made a party to a suit as a representative of the estate binds the heirs and others having interests so as to conclude their rights. *Buck v. Lockwood*, 242.

See **EQUITY** (4, 6); **EXECUTORS AND ADMINISTRATORS**.

ESTOPPEL—See **MUNICIPAL CORPORATIONS** (4); **SALES** (2, 3); **VENDOR AND PURCHASER** (2, 3).

EVICTION—See **FORCIBLE ENTRY AND DETAINER** (2).

EVIDENCE.

1. The trial court was justified in excluding an explanation given in a letter why the plaintiff returned certain papers, on the ground that it was self-serving. *Prussia v. Bailey*, 77.
2. Evidence, in an action on a certain note that defendant claimed had been paid, considered and held, to justify the court in submitting the issue of payment to the jury. *Id.*
3. The claim of plaintiff being that the contract on which plaintiff's notes were based was invalid on the ground that it was entered into on Sunday, the court did not err in refusing to permit a witness to testify where plaintiff was on Monday morning, following the date in controversy. *Id.*
4. The trial court committed reversible error, on cross-examination of one of the medical experts of defendant, in permitting counsel, on interrogating the witness, to show what certain medical authorities claimed and that the question was differently answered by others, as the testimony tended to interject the opinions of persons who were not wit-

EVIDENCE—Continued.

- nesses in opposition to the opinions of some of the witnesses of defendants, who were charged with negligently maintaining light wires. *Sykes v. Village of Portland*, 87.
5. On the trial of a homicide case, it was improper to permit the prosecuting attorney to impeach the mother of the accused, who testified in his favor, upon being called by the prosecution, on immaterial statements alleged to have been made by her, and, the tendency of such testimony being to raise a false issue, was of so prejudicial a nature as to require the reversal of the conviction. *People v. Lahnala*, 144.
 6. In a negligence action where the plaintiff charged that defendant's servant negligently collided with and damaged his automobile, and the defendant contended that the driver was not in his employ and used the car without the consent or knowledge of such owner, evidence was admissible to show that the defendant had in a previous suit against plaintiff for the same collision averred in his declaration that he, by his agent or servant, was in charge of the car when the collision took place. *Cady v. Doxtator*, 170.
 7. It was also competent to show as an admission that the defendant testified on the previous trial that the driver was in his employ and the evidence was not necessarily impeaching testimony such as would require the laying of a foundation to impeach the party testifying. *Id.* 171.
 8. And the evidence conflicting, the question of agency was one of fact and the trial court properly refused to direct a verdict for defendant. *Id.*
 9. On the issues as to whether the mule was vicious and as to whether defendant's servants knew of its alleged vicious propensities, testimony that it had a bad eye, that it kicked at witness, that witness could tell by its look that it was not a safe animal, was admissible, as disposition of animals is judged, in part, at least, by appearance and movements. *Robbins v. Magoon & Kimball Co.*, 200.
 10. Where it was plaintiff's theory that the kick of the mule injured the spleen and kidney and caused the death of decedent, although it broke no bones and left only slight marks upon the body, evidence of a physician that such a case had occurred within his personal observation was admissible to meet the contention of defendant that the result attributed to the kick was improper because no external evidences of injury and no broken bones were found. *Id.*
 11. In a suit upon a note given jointly to husband and wife for money loaned and furnished by them jointly, defendant could not show that the money, as against his creditors, really belonged to the husband alone; and advances to the

EVIDENCE—Continued.

husband could not be set off against said claim. *Kincade v. Peck*, 207.

12. The question asked of plaintiff, on cross-examination, whether any one depended on him for support, was not material and was properly excluded, since his damages were not in any way affected by his family requirements, or necessities. *Foley v. Railway Co.*, 233.
13. After testifying that, from examination of plaintiff after the accident, he was of the opinion that he had been drinking, the physician, who was a witness for defendant, was rightly prevented from answering the interrogatory whether he had stated that the plaintiff had told him that he had been drinking, on objection to the form of the question, when counsel was not prevented from showing the extent to which plaintiff's condition might have been due to the use of intoxicants. *Id.*
14. The mortality tables were improperly received in evidence in a personal injury action in which plaintiff admitted she had a weak heart and had suffered from goitre or what was described as "Graves Disease," which was almost cured and where her condition was aggravated by the accident. *Norris v. Railway*, 578.
15. Upon testimony of plaintiff's physician that the injury to her ankle was of a permanent nature, the court was right in submitting to the jury the matter of damages. *Id.*

See APPEAL AND ERROR (5, 7, 9); BANKRUPTCY (3, 4); BROKERS (3, 4); CARRIERS (5, 7, 10, 12, 13); CONTRACTS; CRIMINAL LAW 5-7, 9, 12, 19, 21-24); DAMAGES (3); DIVORCE (8); ELECTRICITY (2-5); FIRES (3, 5); HOMESTEADS (1); INSURANCE (3); MALICIOUS PROSECUTION (2, 3); MASTER AND SERVANT (10, 14, 15); MECHANIC'S LIENS (3); NEGLIGENCE (8); NEW TRIAL (3); PERJURY (2); PLEADING (2, 8); RAILROADS (2); SALES (4); STREET RAILWAYS (4, 6); TELEGRAPHS AND TELEPHONES (6); TRIAL (1-5, 7, 8); WATERS AND WATERCOURSES (3); WILLS (2-4, 8).

EXAMINATION—See TRIAL (2).

EXCAVATIONS—See NEGLIGENCE (6, 7); STREET RAILWAYS (10).

EXCEPTIONS—See APPEAL AND ERROR (3).

EXCESSIVE DAMAGES—See PLEADING (7).

EXCESSIVE DEMAND—See TAXATION (3).

EXCESSIVE VERDICT—See CARRIERS (15); DAMAGES (3).

EXCLUSIVE JURISDICTION—See EQUITY (7).

EXECUTORS AND ADMINISTRATORS.

Where the administrator, an attorney, expended a large part of the estate for attorney's fees that he paid to the

EXECUTORS AND ADMINISTRATORS—Continued.

firm of which he was a member, and in an annual accounting the court passed on and allowed the disbursements and certain fees, the allowance of such annual account was not so conclusive upon the parties in interest that it could not be noticed and taken into consideration in determining the administrator's claim for extraordinary compensation included in his final report, though no appeal was taken from the prior order and although the same would not be disturbed by the court, in the absence of fraud. *In re O'Leary's Estate*, 282.

See EQUITY (7); ESTATES OF DECEDENTS.

EXEMPTIONS—See HOMESTEADS (1, 2).

EXPERIENCE—See ELECTRICITY (5).

EXPERT TESTIMONY—See ELECTRICITY (2, 4).

EXPERT WITNESS, EXAMINATION OF—See CRIMINAL LAW (12).

EXPRESS TRUST—See TRUSTS.

EXTENDING TIME—See APPEAL AND ERROR (6).

EXTRA COMPENSATION—See CONSTITUTIONAL LAW (4, 5).

EXTRAORDINARY STORM—See STREET RAILWAYS (10).

EXTREME CRUELTY—See DIVORCE (5).

FALSE IMPRISONMENT.

Where the son of plaintiff, in a negligence case for the killing of two horses, made an affidavit for a *capias ad respondendum*, under 3 Comp. Laws, § 9999 (re-enacted, Judicature Act, 3 Comp. Laws 1915, § 12416), which was found to be technically defective, but set up facts showing a sufficient cause of action, and where the defendant afterwards brought an action for false imprisonment, the writ was a good defense, the affiant having and showing personal knowledge of the facts, though failing to allege the ownership of the team. *Thomas v. Rosecrantz*, 357.

FEAR—See DURESS (4).

FEDERAL EMPLOYERS' LIABILITY ACT—See RAILROADS (3).

FELLOW SERVANT—See RAILROADS (3).

FENCE—See ADVERSE POSSESSION (3).

FICTITIOUS NAMES—See PARTNERSHIP.

• FIRE INSURANCE—See INSURANCE.

FIRES.

1. Where a witness saw a train pass near a field of stubble which was shortly after on fire and which set fire to the buildings on the farm of one who was insured by the plaintiff, and it was shown that the wind was blowing from the railroad towards the buildings, the evidence presented a question for the jury as to the origin of the fire, and under evidence tending to show, in defense, that the locomotive had been inspected and was in good condition, the question of its fitness for operation was for the jury. *Michigan Mutual Home Ins. Co. v. Railway Co.*, 429.
2. Plaintiff was also entitled to the request to charge that in determining whether the engine was in good working order or not the jury might consider the fact that subsequent to the bringing of suit the defendant paid the property owner \$2,800 for his loss, not covered by insurance; it was not incompetent under the rule excluding proof relating to negotiations for compromise, upon evidence that the payment had not been made under circumstances that the court could infer an understanding that evidence of it should not be offered. *Id.* 430.
3. Whether the testimony is admissible in any particular case is a preliminary question to be decided by the trial court, and is analogous to the determination of the admissibility of confessions in criminal cases. *Id.*
4. Testimony having a tendency to show that the adjustment made with the property owner proceeded along usual lines, and was not so much a question of liability as of amount, authorized the court in receiving it as proof of, or an admission of, liability. *Id.*
5. And taking into consideration the fact that plaintiff offered no proof of negligence in operating the locomotive, it was not error of a harmful nature to permit an amendment of the declaration at the trial so as to count upon negligence in operating the engine; nor was defendant necessarily entitled to an adjournment on account of surprise. *Id.*

FLOWING LANDS—See WATERS AND WATERCOURSES (3-6).

FORCE—See FORCIBLE ENTRY AND DETAINER (1, 2).

FORCIBLE ENTRY AND DETAINER.

1. A complaint before a circuit court commissioner, which does not state that the defendant entered into the premises with force or that he unlawfully holds them by force, as required by 3 Comp. Laws 1915, § 13231, is not a complaint for forcible entry or detainer, and does not cover the case of a landlord who retains possession of his premises against the right and demand of his tenant. *Ohyowski v. Steinberg*, 547.

FORCIBLE ENTRY AND DETAINER—Continued.

2. There must be evidence, to support the proceeding, that the entry or detainer was riotous, or personal violence must be used or in some way threatened, or the conduct of the parties guilty of the entry or detainer must be such as in some way to inspire terror or alarm in the persons evicted or kept out; in other words, the force is not against or upon the property, but force used or threatened against persons as a means, or for the purpose of, evicting or keeping out the possessor. *Id.*
3. Summary proceedings, under the provisions of 3 Comp. Laws 1915, § 11164 *et seq.*, cannot be brought for the possession of premises by a lessee against the landlord, who refuses to give or restore possession. Plaintiff's remedy is damages or ejectment. *Id.* 548.

FORECLOSURE—See FRAUDULENT CONVEYANCES (6).

FORMER OWNER—See EQUITY (1).

FRANCHISE—See STREET RAILWAYS (5).

FRAUD—See BANKRUPTCY (5); BROKERS (4); CRIMINAL LAW (21); EQUITY (10); MASTER AND SERVANT (3).

FRAUDS, STATUTE OF.

1. Under the amendment of Act No. 238, Pub. Acts 1913, avoiding any agreement to pay a commission on the sale of real estate unless in writing, correspondence in which it was stated that a note from plaintiff to defendants might be paid out of commissions earned in selling lands in Florida did not satisfy the statute of frauds, since it did not show all the terms of the contract. 3 Comp. Laws 1915, § 11981. *Paul v. Graham*, 447.
2. A memorandum, to be sufficient, must be complete in itself and leave nothing in parol. In an agreement to pay broker's commissions the time of payment, rate of commission, and time of termination, etc., are essential elements which should be mentioned in the contract. *Id.*
3. No recovery is allowed on the *quantum meruit* for the value of broker's services, in the absence of a written agreement, as such a holding would deprive the statute of its force. *Id.*

See **BROKERS (1); TRUSTS.**

FRAUDULENT CONVEYANCES.

1. A contract to care for the mother of the grantor in a deed, undertaken and in part carried out by the promisor, was sufficient to support a conveyance from one brother to another of the interest of the former in his deceased father's estate, as against creditors of the transferor. It was not such an agreement as would create a trust or

FRAUDULENT CONVEYANCES—Continued.

secret agreement that could be attacked by said creditors. *Schmidt v. Steinbach*, 640.

2. And the grantee was not entitled, until he had completed his contract, to assert his rights by the commencement of a suit to clear his title against creditors that had levied execution on the legal title of the debtor. *Id.*
3. In such a case the legal title remained in the grantor subject to the contract right of the brother and was liable to execution sale. *Id.*
4. The levy is by statute given priority over all prior grantees, mortgagees and others of whose claims the judgment creditor shall not have actual or constructive notice. And occupancy sufficiently puts the levying creditor on such notice. Act No. 227, Pub. Acts 1889, 3 Comp. Laws 1915, § 12898. *Id.*
5. That the mortgagee had executed a bond to guarantee an indebtedness of the corporation to a bank was a sufficient consideration for the transaction, as against a creditor. *Osborn v. Detroit Kraut Co.*, 665.
6. In a suit to cancel two mortgages of a corporation running to stockholders of the company, the court had no power to foreclose one of them, which it determined to be a valid obligation. *Id.*
7. The board of directors has power to authorize the execution of a mortgage to secure corporation debts, which such action does not tend to increase. *Id.*
8. One who held corporate stock as a pledge, without transferring the stock certificates on the books, merely entering a memorandum on the stubs in the certificate record, was not entitled to notice of a meeting of the stockholders. *Id.*
9. The holder of corporate stock, belonging to a majority stockholder as collateral security for notes of the corporation, is a simple contract creditor, not entitled to an equitable lien in the nature of a mortgage on the property of the corporation, but is entitled to have the entire stock so held transferred in his name on the failure of the corporation to pay some of the notes. *Id.*

See ASSIGNMENT; EQUITY (12).

FRAUDULENT MISREPRESENTATION—See ACTION (2).

FREIGHT PAID BY CONSIGNEE—See CARRIERS (1).

FUTURE DAMAGES—See DAMAGES (4).

GOOD FAITH—See DURESS (4); EQUITY (5, 10).

GRAND JURY—See CRIMINAL LAW (1, 4, 6, 16).

GUARANTY—See SALES (1).

HEARSAY—See APPEAL AND ERROR (5); EVIDENCE (1, 13); TRIAL (5).

HERNIA CAUSED BY PARTICULAR STRAIN—See MASTER AND SERVANT (8).

HIGHWAYS AND STREETS—See ADVERSE POSSESSION (1); EQUITY (1-3); STREET RAILWAYS (5, 6, 10).

HOMESTEADS.

1. As mere absence from her homestead for four or five years would not conclusively establish abandonment of the homestead rights of an old lady of seventy-five years of age, the enforced absence of such owner because of feeble health or the necessity of going out to earn a living, by work as a nurse, did not authorize a creditor to levy on the property, though she also, about the same time, sold her furniture and rented the land and residence, and had offered to sell the place in a deal for certain village property which she could have occupied in the same manner. The question of abandonment of a homestead is principally a question of intention. *Steel v. Blanchette*, 167.
2. Upon selling the homestead with the purpose of investing the proceeds in another home, the proceeds also become exempt during the transition up to the statutory limit of fifteen hundred dollars. *Id.* 168.
3. The conveyance of a homestead to a third party executed by the husband alone, for the admitted purpose of creating an estate by the entirety, vested the intended estate in the husband and wife, to whom a reconveyance was forthwith executed, absence of the wife's signature not avoiding the conveyance under Art. 14, § 2, of the Constitution, which was for the protection of the wife's interest. *Weaver v. Michello*, 572.

See DOWER.

HOMICIDE—See CRIMINAL LAW (10); EVIDENCE (5).

HOSTILE WITNESSES—See CRIMINAL LAW (9).

HUSBAND AND WIFE—See DOWER; HOMESTEADS (3).

HYPOTHETICAL QUESTION—See STREET RAILWAYS (4).

IMMORAL CONDUCT—See ACTION (2).

IMPEACHMENT—See CRIMINAL LAW (9); EVIDENCE (5, 6).

INCHOATE RIGHT—See DOWER.

INCOMPETENT SERVANT—See MASTER AND SERVANT (2).

INCONSISTENT CLAIMS—See CARRIERS (12).

INDEPENDENT CONTRACTOR—See MASTER AND SERVANT (13).
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INDICTMENT AND INFORMATION—See CRIMINAL LAW (3, 4).

INDORSEMENT OF PAYMENTS—See LIMITATION OF ACTIONS (4).

INDUSTRIAL ACCIDENT BOARD—See MASTER AND SERVANT (11).

INFERENCE—See WILLS (6).

INFIRM PASSENGER—See CARRIERS (4, 6).

INJUNCTION.

1. Where plaintiff filed a bill to enjoin defendants from maintaining a garnishment suit upon certain contracts for broker's commissions for selling lands, representing that there existed an oral arrangement between them and their agents, including plaintiff, that they would set off their commissions against certain sums due to the company upon land contracts, and complainant prayed for an injunction and for an accounting under the contracts, the bill was not multifarious, and presented a case for equitable cognizance. *Long Point Development Ass'n v. McIntosh*, 567.

2. The exception to Act No. 283, Pub. Acts 1915, relating to injunctions staying proceedings in State or Federal courts, and limiting authority to issue the same to a judge having the same territorial jurisdiction, is repealed by the judicature act. 3 Comp. Laws 1915, § 12004 *et seq.* The general repealing clause, referring to acts inconsistent therewith, repealed the pre-existing statute, since the last clause, omitted in the judicature act, was not consistent with the new statute. *Id.*

See EQUITY (1); VENDOR AND PURCHASER (1, 3).

INSOLVENCY—See CRIMINAL LAW (23, 24).

INSTRUCTIONS—See ADVERSE POSSESSION (4); APPEAL AND ERROR (7, 11); BANKRUPTCY (3); CARRIERS (8); CRIMINAL LAW (18, 21, 24); DAMAGES (2); FIRES (2); MALICIOUS PROSECUTION (2); NEGLIGENCE (4); PERJURY (3, 5-7); SALES (5); STREET RAILWAYS (5-8, 10); TRESPASS (1); TRIAL (10); WILLS (7).

INSUFFICIENT VERDICT—See DAMAGES (1).

INSURANCE.

1. Where defendant surrendered a certificate of fire insurance in a mutual benefit corporation, and the secretary canceled her policy, she was liable for the amount of her pro rata share of the losses and expenses during the period from the last assessment to the time of cancellation, and, on the trial of an action for the alleged indebtedness, the insurer was entitled to a finding that the sum in question became payable immediately on the receipt of her request for cancellation, and "that it was

INSURANCE—Continued.

not necessary for the company to make an assessment roll and place thereon the members of plaintiff company" before it could recover. *Patrons' Mutual Fire Ins. Co. v. Butler*, 648.

2. The member withdrawing is obligated to pay, not only all regular assessments outstanding against him, but also all other sums that might lawfully be made the subject of assessment at the time of surrender, and it is payable at once on ascertainment. *Id.*
3. Testimony of the secretary that a sum named by him was due from defendant and that it was her ratable proportion of the assessment made a *prima facie* case. *Id.*

See FIRES (1, 4).

INTENT—See CRIMINAL LAW (21, 23, 24); DIVORCE (2); HOME-STEADS (1, 2); MALICIOUS PROSECUTION (2); MASTER AND SERVANT (15); PERJURY (3); PLEADING (5).

INTERESTED PERSONS—See WILLS (1).

INTERPRETATION OF AWARD—See MASTER AND SERVANT (12).

INTERSTATE COMMERCE—See CARRIERS (9).

INVALID NOTICE—See TAXATION (2).

INVITATION TO RIDE—See MASTER AND SERVANT (27).

JOINDER OF CAUSES—See ACTION (1).

JOINDER OF PARTIES—See PLEADING (5).

JOINT ACT—See PLEADING (5, 6).

JOINT TENANCY—See VENDOR AND PURCHASER (4).

JUDGMENT—See AUTOMOBILES (3); EQUITY (9); ESTATES OF DECEDENTS.

JUDGMENT CREDITORS—See FRAUDULENT CONVEYANCES (2-4).

JUDGMENT ENTERED ON AWARD—See MASTER AND SERVANT (11, 12).

JURISDICTION—See ADMIRALTY; DIVORCE (6); EQUITY (5, 11); FORCIBLE ENTRY AND DETAINER (3); WATERS AND WATERCOURSES (1).

JURY—See BANKRUPTCY (3); STREET RAILWAYS (8); TRIAL (10).

JURY QUESTION—See MASTER AND SERVANT (1); PERJURY (4).

JUSTICES OF THE PEACE—See PERJURY (1).

JUSTIFICATION—See FALSE IMPRISONMENT.

KNOWLEDGE—See AUTOMOBILES (4); CRIMINAL LAW (21-24).

LADDER—See MASTER AND SERVANT (21).

LAND CONTRACTS—See VENDOR AND PURCHASER (1).

LANDLORD AND TENANT—See EJECTMENT (2); FORCIBLE ENTRY AND DETAINER (1, 3); NEGLIGENCE (1-3).

LANDLORD'S OBLIGATION TO THIRD PERSONS—See NEGLIGENCE (1).

LEASE—See VENDOR AND PURCHASER (7, 9).

LETTERS—See EVIDENCE (1).

LEVY—See FRAUDULENT CONVEYANCES (2, 3).

LIABILITY OF SHIPPER—See CARRIERS (3).

LICENSE—See MASTER AND SERVANT (23, 24).

LIMITATION OF ACTIONS.

1. While the general rule is that, if relied upon, the statute of limitations must be pleaded, yet it has not been applied in such way as to prevent a plaintiff from having the advantage of the statute when a demand sought to be set off by the defendant is barred by the statute. *Kincade v. Peck*, 207.
2. Where defendant loaned plaintiffs money, taking their note for one or five years, which was afterwards destroyed at their solicitation, and parol promise to pay accepted in lieu thereof, and ten years after said note was given defendant borrowed of plaintiffs \$200, and gave the note in suit, defendant's demand against plaintiffs, which matured more than six years before suit was begun, was barred by the statute of limitations. *Id.*
3. And where a division wall between two buildings was used for the period of the statute of limitations it became a party wall, without any recorded agreement. *Weadock v. Champe*, 554.
4. To establish that an indorser of a promissory note consented to indorsements of small payments that were made through one of his firm, who were attorneys for the holder, it was not essential to prove his actual words or to show his consent in writing, but the consent and authority might be implied from his relations, circumstances and other facts having a bearing. *Myers v. Improvement Co.*, 697.
5. And the tolling of the statute of limitations was not applicable, nor did the statute cease to run, where another indorser was under obligations to apply payments on the collateral security to satisfy the note, but failed to carry out the obligation during part of the time: it could not be said that the indorsers were voluntary trustees so as

LIMITATION OF ACTIONS—Continued.

to interrupt the operation of limitation of action. The cause of action would be barred two years after it was discovered, under 3 Comp. Laws 1915, § 12330, relating to causes of action fraudulently concealed. *Id.*

LOCALITY—See ADMIRALTY.

LOCOMOTIVES—See FIRES (1, 2, 5).

LOGS AND LOGGING—See APPEAL AND ERROR (9); TRESPASS.

LOSS OF FINGER—See MASTER AND SERVANT (5).

MALICIOUS PROSECUTION.

1. In an action for malicious prosecution, in which plaintiff declared against the defendant for wrongfully causing plaintiff's arrest under a criminal charge for fraudulently disposing of hogs mortgaged to plaintiff, the general charge of the court that the advice of counsel, followed in good faith, after a full and fair statement of all the material facts, is a defense to an action for malicious prosecution, though the facts so stated do not justify the advice given, and that if the defendant went to the prosecuting attorney and made a full and fair statement of all the material facts in the case, and the prosecuting attorney advised him that he had a right to make complaint against plaintiff for disposing of the chattel mortgage property under the statute, and defendant, in good faith, followed the advice of counsel, that would be an absolute defense, but it would not be such defense if the statement was not full and fair, the court sufficiently covered a request that in placing the facts before the prosecuting attorney defendant was not required to be the judge of what was material and necessary and was only required to state the case as he fairly understood it, etc. *Whittemore v. Walter*, 365.
2. It was not error to admit evidence competent for one purpose and incompetent for another under instructions as to extent, the manner and limitations under which it could be considered. And, hence, where it was claimed by plaintiff that he had defendant's permission to sell the hogs in question and apply the proceeds on the chattel mortgage, the testimony was admissible on the question of intent, if not for the purpose of showing a variation in the terms of the mortgage, and the jury were properly instructed to consider it for the one purpose only. *Id.* 366.
3. *Held*, also, that the trial court did not err in submitting to the jury the claim of plaintiff that he had permission to sell the animals when they became fit to market. *Id.*

MANDAMUS—See APPEAL AND ERROR (6).

MARRIED WOMEN—See DURESS (1, 4).

MASTER AND SERVANT.

1. Where the question before the court was whether the act complained of was an act of negligence of the master of the launch for which defendants were liable, or was an error of judgment in a case of emergency, it was proper to submit it to the jury for determination. *Gordon v. Drake*, 64.
2. Where there was no evidence that the master had knowledge or notice of the servant's claimed incompetency, or anything that was sufficient to put him upon inquiry, the court did not err in taking that question from the jury. *Id.*
3. Where there was no evidence of any deceit practiced by the agent of an insurance company in obtaining an injured employee's signature to an agreement for compensation for the loss of a finger, and he did not ask to have it read, nor read it himself, although competent to do so, and he claims that he supposed it was a receipt, he will not be heard to deny its validity. *Winn v. Adjustable Table Co.*, 127.
4. Such agreement may be reviewed by the Industrial Accident Board, upon proper showing, under section 13, pt. 3, Act No. 10, Extra Session 1912, and the compensation ended, diminished, or increased in accordance with the law and facts, but, as a general rule, the essentials leading up to the award are to be taken as *res adjudicata*, except the physical condition of the injured employee. *Id.*
5. The order of the Industrial Accident Board setting aside an agreement between the employer's insurer and the injured employee fixing the compensation for the injury as provided in the law for the loss of a finger, and awarding compensation as for partial disability, is reversed, for the reason that the loss of the finger, combined with a former accident, rendered the employee totally incapacitated from following his trade as a carpenter, and the provisions of the law providing compensation for partial disability are inapplicable (section 10, pt. 2, Act No. 10, Extra Session 1912), and the agreement entered into was in accord with the law and should stand. *Id.*
6. *Held*, the claim of applicant that the award of the board was based in part upon an impairment of the shoulder, due to the accident, is not sustained upon the record, and the former decision is affirmed. *Id.* 128.
7. Where a switchman was injured by being crushed between the jamb of a door and a car which was wider than those he had been accustomed to handle, in the absence of testimony that he supposed all the cars handled by his crew were of one width, or any excuse for failure to observe that cars were of unequal width, it being common knowledge that freight cars are of different dimensions, defend-

MASTER AND SERVANT—Continued.

- ant railroad company was not negligent in failing to notify plaintiff that the car in question was wider than the cars he had been handling. *Sage v. Railroad Co.*, 194.
8. Where claimant's husband, a brick mason in defendant's employ, suffered an injury while lifting a terra cotta window sill into place, and strangulated hernia resulted, which caused his death later, after two operations, claimant was entitled to compensation under the workmen's compensation law (Act No. 10, Extra Session 1912, 2 Comp. Laws 1915, § 5423 *et seq.*), and the presence of a structural weakness or actual pain, antedating the injury, in the region affected, would not preclude recovery if the injury itself was distinct and the result of a particular strain. *Bell v. Hayes-Ionia Co.*, 192 Mich. 90. *Hurley v. Construction Co.*, 197.
 9. In an action for the alleged negligent death of defendant's employee, caused by the kick of a mule, where defendant had not elected to come under the provisions of the workmen's compensation law (Act No. 10, Extra Session 1912, 2 Comp. Laws 1915, § 5423 *et seq.*), the defense that plaintiff's decedent had knowledge of the vicious character of the mule and assumed the risk, is not open to defendant. Act No. 10, Extra Session 1912, pt. 1, § 1, subd. c. *Robbins v. Magoon & Kimball Co.*, 200.
 10. *Held*, that the evidence supported the conclusion that the cause of death was a kick by a vicious mule, as alleged. *Id.*
 11. While there are difficulties in the way of applying the provisions of section 13, pt. 3, Act No. 10, Extra Session 1912 (2 Comp. Laws 1915, § 5466), providing for entering judgment in the circuit court upon presentation of a certified copy of the decision of the Industrial Accident Board approving the agreement of settlement, especially in cases where, by the terms of the award, liability of the employer to make weekly payments runs with disability of the employee, and the disability is not permanent, it is not impossible to apply the law according to its terms; however, a series of judgments upon an award is not contemplated by the act, although a series of executions may be required to enforce payment of the judgment; and the judgment should be entered "in accordance" with the award, by reciting and following the award, which furnishes the data for further action of the court. *Brown v. George A. Fuller Co.*, 214.
 12. The judgment of the court below, agreeing with claimant's interpretation of an ambiguous award, which may be interpreted as claimant claims, will not be disturbed, where no objection was made as to its form, and no error of law appears requiring reversal of the judgment or requiring the court to set it aside. *Id.* 215.

MASTER AND SERVANT—Continued.

13. Where claimant's husband had been employed for more than a year at irregular intervals by a roofing company, at a daily wage, laying roofs, and was accidentally killed while laying a roof for the same firm, which he had taken by the job, to be paid for at so much per square, he was not a servant or employee entitling claimant to compensation under the provisions of the workmen's compensation law (Act No. 10, Extra Session 1912, 2 Comp. Laws 1915, § 5423 *et seq.*), but was an independent contractor. *Gall v. Journal Co.*, 191 Mich. 405 (158 N. W. 36). *Perham v. Roofing Co.*, 221.
14. In a suit for compensation for plaintiff's services as a carpenter, evidence that several checks used to pay him his salary were those of a corporation of which defendant was an officer was properly limited by the charge of the court to proof of payment, under the testimony of plaintiff, not contradicted, that the checks were received by his wife and that he had never seen them, nor did he know by whom they were drawn. *Harmon v. Parker*, 542.
15. And at the trial, it was proper to exclude testimony in reply to the interrogatory of defendant whether he made the bargain in the capacity of an officer or as an individual; the fact should be established by the conversation of the parties and surrounding circumstances, not by the conclusion of the witness. *Id.*
16. It is the duty of the agent, if he would avoid personal liability, to disclose his agency. Nor is it sufficient that the other party has the means of ascertaining the name of the principal. The agent must either bring home to him actual knowledge, or that which to a reasonable man is equivalent to knowledge, or the agent will be bound, and if he does not do so he may be held personally responsible upon the presumption that he so intended. *Id.*
17. Where the issue was whether, in hiring the plaintiff as a carpenter, the defendant was dealing as an individual or as a corporate officer, and the attorney for defendant requested the court to charge that if, at the time, plaintiff knew defendant was acting in a representative capacity, only, and not in his individual capacity, there would be no necessity of disclosing the alleged agency, etc., the request, which was a correct statement of the law, and might very well have been granted by the court, was sufficiently covered by a general charge that if plaintiff had it in mind he was not hired by, or was not to look to, defendant for his pay, the bargain was made with the corporation, and by further instructions of a general character and of similar tenor. *Id.*
18. The words peril or accident denote an unexpected occurrence or mishap, taking place without design. *Schroetke v. Jackson-Church Co.*, 616.

MASTER AND SERVANT—Continued.

19. One who suffers from some shock, or nervous condition, as a result of an untoward incident, or disturbing event, arising in connection with or out of his employment, may recover compensation from the master. *Id.*
20. A watchman, who received a nervous shock from the breaking out of a fire on his employer's premises, resulting in heart failure and death, was within the compensation act and his wife could recover as for an accident; and an order denying the award is reversed and the cause remanded to the accident board. *Id.*
21. Where plaintiff was doing construction work about the plant of the Au Sable Electric Company, and was employed by defendant power company, he was not engaged in duties incident to his employment at the noon dinner hour, when he had no property or particular service of the master in charge, and had taken his dinner pail and started to climb a ladder to eat his lunch upon the boilers. The breaking of the ladder was not such an accident resulting from defendant's negligence as would render it liable to a workman after he had ceased his employment to seek a place for the said purpose. *Boner v. Power Co.*, 629.
22. Though the injured party remained upon the premises where he was employed, the relation of master and servant did not continue, as he was at liberty to go wherever or do whatever he pleased. *Id.*
23. The injured party was a mere licensee as to the company that had allowed him in its plant, and, as to his employer, there was no ground upon which he could recover against it, unless the possession of the construction company was such that its control, and that of the power company which owned the plant, could be said to be joint. *Id.*
24. Plaintiff could not rightly recover against either defendants above mentioned on the theory that the relationship of master and servant existed at the time, but the court should have submitted the issue to the jury whether or not a duty was owing to plaintiff as a licensee, by either of the defendants. *Id.*
25. Evidence by another servant that he notified the assistant superintendent of the power company that the rung of the ladder was loose and would turn, charged the other defendants with no duty. He was in no way connected with them. There was no evidence of notice which would charge them. *Id.* 630.
26. Where plaintiff was hired by a railroad company, about a year before he was injured, to work as a hostler's helper, and the evidence showed he was to work in and around the roundhouse and assist the hostler in the discharge of his duties, which did not require him to go out on the

MASTER AND SERVANT—Continued.

main line or ride upon the engines, he could not recover for injuries that he sustained in jumping from a moving train and catching his foot in a frog. He was not injured in the course of his employment, although the engineer may have invited plaintiff to ride. Nor did he alight under orders because he saw the engineer motion to him to get off. The invitation was outside of the scope of the engineer's authority. *Stornelli v. Railway Co.*, 674.

27. Where it was not within the scope of authority of the engineer to invite him to ride, and, where there was no evidence that plaintiff was ordered to jump from the moving train, and only a scintilla of evidence that he was invited to ride on it, the defendant railway corporation could not be held responsible, in a case for negligent injuries against a company that did not come under the compensation act. *Id.*

28. The burden rested upon the plaintiff, in order to recover, to show negligence, although the workmen's compensation act deprives the employer of other defenses. 2 Comp. Laws 1915, § 5423 *et seq.* *Id.*

See AUTOMOBILES (1); CARRIERS (9); RAILROADS (3, 6).

MECHANIC'S LIENS.

1. A claim of lien for a contractor's work installing a heating apparatus in a house need not state the date of commencing performance definitely if it states the last date sufficiently to comply with the statute. *John F. Noud & Co. v. Stedman*, 459.

2. But it must state, as required by statute, the name of owner, part owner, or lessee, if known. A failure to observe this requirement is fatal. *Id.*

3. The claim on its face must show the essentials without extraneous aid; evidence to supplement it, if deficient in this particular, will not be admitted. *Id.*

MEDICAL EXPERT—See EVIDENCE (4).

MEETING OF MINDS—See CONTRACTS.

MEMORANDA—See TRIAL (2).

MERGER—See DOWER.

MINIMIZING DAMAGES—See WATERS AND WATERCOURSES (4).

MINORS—See EQUITY (1); NEGLIGENCE (1, 4).

MISCONDUCT OF COUNSEL—See TRIAL (6).

MODE OF CONSTRUCTION—See ELECTRICITY (2).

MORTALITY TABLES—See EVIDENCE (14).

MORTGAGES—See ASSIGNMENT; EQUITY (12); FRAUDULENT CONVEYANCES (6, 9).

MULTIFARIOUSNESS—See EQUITY (4); INJUNCTION (1).

MUNICIPAL CORPORATIONS.

1. Where, previous to the adoption of a charter under the new Constitution, a stockkeeper was appointed by the mayor of a city and held office at a weekly salary, and later a new charter was adopted providing that all appointive officers having indefinite tenure should continue in office under the charter until successors were appointed, and where the official took an oath of office and his duties consisted in having charge of the brickyard where tools and implements were located and a key of the brickyard and building therein, he was an employee and did not belong to the class of appointive officers. *Jones v. City of Battle Creek*, 1.
2. By paying for an entire issue of municipal bonds of the city of Bay City at a price agreed upon, without any report of further dealings therewith by the bank, which in turn disposed of nearly all the bonds to its customers, the bank became a purchaser, not an agent, of the city, which had or claimed no interest in the proceeds of subsequent sales made to customers of the bank, and especially where the parties themselves treated the transaction as a sale and so described it in the written contract executed between them. *City of Bay City v. Bank*, 533.
3. Under Act No. 720, Local Acts 107, which authorizes the expenditure of the funds from the foregoing bond issue exclusively for the purposes of a park, the payment of \$4,000 to defendant bank as a commission for the sale of the bond issue, out of the proceeds, was unlawful and in excess of the authority granted by statute, amounting in effect to a rebate or discount. *Id.* 534.
4. Plaintiff city was rightly held by the trial court to be entitled to recover back the commission, so called, as the doctrine of estoppel which defendant attempted to interpose would not be held applicable to an unauthorized payment in violation of statute. *Id.*

See ADVERSE POSSESSION (2); ELECTRICITY (1); STREET RAILWAYS (9).

MURDER—See CRIMINAL LAW (10); EVIDENCE (5).

MUTUAL INSURANCE—See INSURANCE.

MUTUALITY—See CONTRACTS.

NAME OF OWNER—See MECHANIC'S LIENS (2).

NAMES—See PARTNERSHIP.

NECESSITY—See TELEGRAPHS AND TELEPHONES (5).

NEGATIVE TESTIMONY—See RAILROADS (2).

NEGLIGENCE.

1. Where defendants leased premises reserving a back porch for common convenience and use of all the tenants, and it extended across the rear of the entire building, they were liable to a minor child who was struck by a post that fell because insufficiently or insecurely nailed at the top, when it appeared that the infant was a guest of one of the tenants and was on the rear porch at the instance of a tenant, since the lessor was not governed by the general rule, in that he retained use of or control of the porch for the benefit of the several co-lessees. *Butler v. Watson*, 322.
2. The lessors were liable to any guest or person rightfully on the property that was reserved for the common use of the occupants, and, not having let the reserved portion to any of the tenants, might be said to be in control of the same, and it became their duty to exercise ordinary care for the safety of the persons about it. *Id.*
3. Though it was claimed by defendants that they had objected to the presence of children on the porch, and declined to lease the property to any person with children, it could not be said that a child one year of age, who was left with the lessee by his grandparents, was wrongfully there. *Id.*
4. And the trial court was correct in charging the jury that the infant was too young to be guilty of contributory negligence; also, that any negligence of the grandparents would not preclude recovery. *Id.* 323.
5. The manner of plaintiff's injury could not be said to have been conjectural when the only doubtful question was whether the post struck it directly, or knocked against the child the person who accompanied it, or struck the two in falling. *Id.*
6. The owner of a parcel of ground who desired to erect a building on his land with a basement of ordinary depth and character was entitled to excavate the entire width of the lot unless some duty to the adjoining owner or the tenant of the building was violated: the mere fact that the excavation caused one of the walls of the building to fall does not in itself establish liability. *Horowitz v. Blay*, 493.
7. Where one of the witnesses for plaintiff testified that the wall should have been underpinned as a protection against the consequences of excavating the adjoining lot, and where plaintiff assumed that the duty of constructing the underpinning rested upon those who made the excavation, but there was no proof that the ground under the wall would have given way except for the weight of the build-

NEGLIGENCE—Continued.

ing, the obligation was not on the excavators but rested with the proprietor of the building. *Id.*

8. Moreover, mere evidence that those excavating permitted water from the mains to accumulate did not show negligence without proofs tending to connect the fall of the building with the water, or that the ground was softened thereby so as to weaken the support. *Id.* 494.
9. Where counsel stated that he had witnesses in court whom he offered to produce to give testimony that the men in charge of excavating the ground were incompetent, inefficient, and negligent, his statement amounted to a conclusion only, and unless the court could determine that the testimony, if received, might or would have changed the result, it will not reverse the judgment, upon writ of error. *Id.*

See AUTOMOBILES (1, 2); CARRIERS (4, 5, 7, 10, 14-17, 19, 20); DAMAGES (1, 2); ELECTRICITY (1); EVIDENCE (12-15); FIRES (1, 5); MASTER AND SERVANT (1, 2, 7, 11, 26-28); RAILROADS (1-5); STREET RAILWAYS (2, 3, 9, 10).

NERVE SHOCK—See MASTER AND SERVANT (19, 20).

NEW BEGINNING—See TRIAL (12).

NEW TRIAL.

1. Any supposed prejudicial consequences of an unintentional default must be presented, after verdict, to the trial court upon motion for new trial. *Kincade v. Peck*, 208.
2. A motion for new trial, based upon affidavits showing cumulative testimony might be produced, without showing due diligence to bring it in upon the first trial, was properly denied. *Id.*
3. Affidavits of plaintiff and his attorney upon a motion for a new trial, as to what an absent witness would testify to, are insufficient, since such motion should not be granted upon hearsay testimony. *Connor v. McRae*, 683.

See APPEAL AND ERROR (1); CRIMINAL LAW (14); DAMAGES (1).

NOMINAL DAMAGES—See DAMAGES (1).

NONRESIDENCE—See DIVORCE (1).

NOTICE—ASSIGNMENT; AUTOMOBILES (1); CARRIERS (6); FRAUDULENT CONVEYANCES (4, 8); LIMITATION OF ACTIONS (5); MASTER AND SERVANT (2, 9, 16); PLEADING (1); TAXATION (2, 3); TRIAL (11); VENDOR AND PURCHASER (9).

NOTICE OF LEVY—See FRAUDULENT CONVEYANCES (4).

OBJECTIONS—See CRIMINAL LAW (1).

- OBSCENE LANGUAGE—See DIVORCE (5).
OBSTRUCTING STREET—See EQUITY (13).
OFFER AND ACCEPTANCE—See VENDOR AND PURCHASER (7, 8).
OFFER OF PROOF—See NEGLIGENCE (9).
OFFICERS—See CRIMINAL LAW (20).
OPENING CASE—See DIVORCE (8).
OPINION EVIDENCE—See ELECTRICITY (2); EVIDENCE (4, 9);
STREET RAILWAYS (4).
OPTIONS—See VENDOR AND PURCHASER (6-9).
ORDERING CONNECTION—See TELEGRAPHS AND TELEPHONES
(1).
ORDER OF PROOF—See CRIMINAL LAW (10).
ORDINANCES—See STREET RAILWAYS (9).
OWNER OF GOODS SHIPPED—See CARRIERS (2).
PARENT AND CHILD—See AUTOMOBILES (1, 4).
PARK BONDS—See MUNICIPAL CORPORATIONS (2, 3).
PAROL CONTRACT—See TRUSTS.
PARTIAL DISABILITY—See MASTER AND SERVANT (5).
PARTIES—See DURESS (2); EJECTMENT; EQUITY (1, 4); FRAUD-
ULENT CONVEYANCES (2); WATERS AND WATERCOURSES (1, 2).
PARTNERSHIP.

Where a banking partnership was organized under the name of the Missaukee County Bank, under the provisions of Act No. 160, Pub. Acts 1859, and the defendants, who executed their note and mortgage to the bank, knew with whom they were, in fact, dealing, and were not misled by want of knowledge of the persons who constituted the firm, the failure of the partners to file a certificate of membership under Act No. 101, Pub. Acts 1907, or to show such changes in the membership of the firm as occurred after its original articles were filed, showing the names of the copartners, was no defense to the foreclosure of a regularly executed mortgage in equity; substantial compliance with the law of organization of the firm, by filing articles of partnership that contained the names of the then members of the bank, sufficiently authorized them to continue in business, and there was no ground in equity to defeat the mortgage. *Missaukee Farm & Investment Co. v. Ferris*, 286.

See DURESS (1).

PARTY CONTESTANT—See WILLS (2).

PARTY WALL—See LIMITATION OF ACTIONS (3); VENDOR AND PURCHASER (8).

PAYMENT—DURESS (1); EVIDENCE (2); LIMITATION OF ACTIONS (5); TRIAL (2).

PERIL—See MASTER AND SERVANT (8).

PERJURY.

1. Respondent was charged with perjury for giving false testimony relative to the purchase of intoxicating liquors from a colored person who was accused of unlawfully furnishing intoxicating liquors. Respondent was given two marked one dollar bills and entered the pool room of the accused and returned with two pints of whisky, which he stated that he bought of the accused. He made a sworn statement to that effect when the warrant was issued. Later, he gave evidence on the examination that he did not purchase the whisky of accused and did not pay him the marked bills which he had received. The people produced evidence that tended to show the contradictory statements of respondent on the two occasions and that he had informed certain witnesses of the purchase of the whisky. The justice of the peace who issued the warrant testified to the statements made by respondent at the time of issuing the warrant. They were not reduced to writing. *Held*, that the object of the examination before the justice, under 3 Comp. Laws 1915, § 15666, is to determine the sufficiency of the ground for a warrant and the evidence need not be written down, also that there was evidence which required the submission of the case to the jury. *People v. McOlintic*, 589.
2. Contradictory statements, whether made under oath or not, do not authorize a conviction for perjury, although the additional testimony of another witness to the falsity of the statement is not required if the truth may be inferred from the combined facts proven. The prosecution, however, must prove which of the two statements is false and by other evidence than the contradictory statements. *Id.*
3. *Held*, that the jury should have been instructed on the point whether or not perjury was committed at the time laid in the information, *i. e.*, the evidence given by respondent when he was called as a witness or whether respondent swore untruthfully on the prior occasion, and that wilful false swearing before the magistrate upon a material matter before the complaint had been made would constitute perjury. *Id.*
4. Testimony of the respondent that he was frightened or cajoled by the officers and by the justice of the peace before whom complaint was made into swearing to the same, and by the use of third degree methods, and, in

PERJURY—Continued.

effect, that his testimony at the subsequent examination was true, presented a proper issue for the jury. *Id.* 590.

5. The court, in giving his instructions to the jury, should have granted respondent's request to charge that, in considering the guilt or innocence of the respondent, before they could convict they must find that the people have proved beyond a reasonable doubt in their minds that the matters sworn to were false in fact and that they must find the respondent did go to the place of business in question and purchase the whisky as charged; further, that they could not find the respondent guilty of testifying falsely upon the testimony of one witness whose testimony is given to prove the falsity of the statement; that in addition to the statement of the witness strong corroborating circumstances of such a character as would clearly turn the scale and overcome the oath of the party accused must be shown. *Id.*
6. If the preliminary testimony made it clear that the statement claimed to have been made was voluntary or involuntary it was the duty of the trial court to admit or reject it; if the matter was left in doubt, it was the duty of the court to admit it and leave the question to the jury under proper instructions to determine whether it was voluntarily made; the jury should have been explicitly advised on this issue. *Id.*
7. The court did not substantially cover the subject of the presumption to be considered, by telling them that the burden rested on the prosecution and the accused came into court clothed with the presumption of innocence, and he stands innocent in their minds until the people, through the prosecuting attorney, had convinced them of his guilt beyond a reasonable doubt; that a reasonable doubt meant a doubt which a reasonable man might have, not a capitious doubt; that the matter did not require mathematical exactness, but the people must prove beyond a reasonable doubt that respondent was guilty, etc. *Id.*

See **DIVORCE** (2, 4).

PERMANENT INJURY—See **DAMAGES** (3); **EVIDENCE** (15).

PERSONAL INJURIES—See **ADMIRALTY** (3); **CARRIERS** (7, 8, 12, 16); **DAMAGES** (1, 3); **EVIDENCE** (14); **MASTER AND SERVANT** (2, 7, 11, 22, 26); **NEGLIGENCE** (1); **STREET RAILWAYS** (9).

PERSONS TO WHOM LIABLE—See **NEGLIGENCE** (3).

PHYSICIANS AND SURGEONS—See **EVIDENCE** (10).

PLEA AND NOTICE—See **AMENDMENTS** (1).

PLEADING.

1. The object of the declaration being to apprise the defendant and the court of the grounds of the pleader's claim, to

PLEADING—Continued.

- give the defendant fair notice of the case he is called to meet, a plain and clear statement of the facts constituting the wrong complained of is sufficient, if expressed with reasonable certainty. *McDonald v. Hall*, 50.
2. It is neither necessary nor proper to allege matters of evidence in a pleading; only ultimate facts should be alleged, not the circumstances which tend to prove them. *Id.*
 3. The theory of separate counts is that each is a complete cause of action, as distinct from others as if it stood alone, and the separate counts are as distinct as if they were in separate declarations, consequently they must contain all necessary allegations, or the latter must expressly refer to the former. *Id.*
 4. While a single count must cover but a single cause of action, yet where a single and continuous purpose runs through an entire transaction made up of various acts, each of which might alone constitute a cause of action, it is proper to set out all the facts in one count as a single cause of action. *Id.* 51.
 5. Where several defendants are charged in one count of a declaration with having made an assault, it sufficiently appears to be a joint act; certainty to a certain intent in general being all that is required. *Id.*
 6. All the torts leading to one damage or object may be joined in one count. *Id.*
 7. Because plaintiff claims too much in his allegation of damages is not ground of demurrer. *Id.*
 8. Where a count states a cause of action against all of the defendants, whether the evidence will sustain the count is a question this court need not consider on certiorari to review the order of the circuit court in overruling a demurrer to the declaration. *Id.*
 9. There was no abuse of the court's discretion in permitting an amendment of plaintiff's declaration, after the proofs were in, by inserting the word "conductor" following the word "brakeman," and further amending by stating that as plaintiff was on the steps and about to alight from the train she informed the defendants' brakeman or conductor that she could not alight unless a step was furnished because she had recently undergone an operation, where the notice was given to either the brakeman or conductor and both were sworn upon the trial, and no claim was made by defendants that they were surprised. *Steketee v. Waters*, 177.
- See ACTION (1); CRIMINAL LAW (3, 16); EQUITY (4, 12); FIRES (5); FORCIBLE ENTRY AND DETAINMENT (1); LIMITATION OF ACTIONS (1); TRIAL (11).

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- PLEA IN ABATEMENT—See CRIMINAL LAW (16).
- PLEDGE—See ASSIGNMENT; FRAUDULENT CONVEYANCES (8).
- POSSESSORY ACTION—See FORCIBLE ENTRY AND DETAINER.
- POWER OF COURT—See DIVORCE (9).
- PRACTICE—See ACTION (1); APPEAL AND ERROR (6); DIVORCE (3); NEW TRIAL (1).
- PREFERENCES—See BANKRUPTCY (1, 2, 4-6).
- PREJUDICE—See NEW TRIAL (1).
- PREJUDICIAL ERROR—See CRIMINAL LAW (11); TRIAL (6).
- PRELIMINARY EXAMINATION—See PERJURY (1).
- PRESCRIPTION—See ADVERSE POSSESSION (1); LIMITATION OF ACTIONS (3); WATERS AND WATERCOURSES (2).
- PRESENCE OF JUDGE—See CRIMINAL LAW (14).
- PRESUMPTION OF INNOCENCE—See PERJURY (7).
- PRESUMPTIONS—See AUTOMOBILES (1); MASTER AND SERVANT (16).
- PREVIOUS DISEASE—See EVIDENCE (14).
- PREVIOUS SUIT—See EVIDENCE (6, 7).
- PRIMARY SCHOOL FUND—See CONSTITUTIONAL LAW (3).
- PRINCIPAL AND AGENT—See APPEAL AND ERROR (7); AUTOMOBILES (1, 2, 4); EVIDENCE (6-8); MASTER AND SERVANT (15-17); MUNICIPAL CORPORATIONS (2); SALES (2, 3).
- PRIVATE PURPOSE—See CONSTITUTIONAL LAW (4).
- PRIVATE WAY—See ADVERSE POSSESSION (1).
- PRIVILEGE—See CRIMINAL LAW (7, 19).
- PROBATE COURTS—See EQUITY (6, 7, 9).
- PROCEEDS—See HOMESTEADS (2).
- PROCESS—See FALSE IMPRISONMENT.
- PROFANITY—See DIVORCE (5).
- PROMISE TO PREFER—See BANKRUPTCY (5).
- PROOF—See INSURANCE (3); TRIAL (1).
- PROSECUTING ATTORNEY—See DIVORCE (6).
- PROSECUTOR—See CRIMINAL LAW (1-3).

PROXIMATE CAUSE—See CARRIERS (16).
 PUBLIC CONVENIENCE—See TELEGRAPHS AND TELEPHONES (5).
 PUBLIC OFFICERS—See MUNICIPAL CORPORATIONS (1).
 PUBLIC UTILITIES—See TELEGRAPHS AND TELEPHONES (3, 4).
 PURCHASER IN GOOD FAITH—See EQUITY (5).
 QUALIFICATION OF WITNESS—See CRIMINAL LAW (12).
 QUANTUM MERUIT—See FRAUDS, STATUTE OF (3).
 QUASHING INDICTMENT—See CRIMINAL LAW (4, 6).
 QUESTION FOR JURY—See MASTER AND SERVANT (1).
 QUIETING TITLE—See FRAUDULENT CONVEYANCES (2).
 RAILROAD COMMISSION—See TELEGRAPHS AND TELEPHONES (1, 4, 6).
 RAILROADS.

1. Where a young man, familiar with a railroad crossing and in possession of all faculties, and knowing that a fast passenger train was about due, was struck and killed by the engine, and there was testimony of various eyewitnesses who did not see the plaintiff until his vehicle was directly upon the track, and where the plaintiff relied in making his case upon the presumption that decedent was in the exercise of due care, the evidence also showing that his view was almost wholly obstructed until his horse was on the tracks, it could not be held as a matter of law that the deceased did not exercise an ordinary degree of care, and the trial court did not err in submitting the issue to the jury. *Cinidar v. Railway Co.*, 38.
2. *Held*, also, in passing on the question of negligence in giving the crossing signals, that the testimony of several witnesses, though negative in character, that from a position in which they might have heard they did not hear the signals given, was sufficient to carry the question to the jury. *Id.*
3. Plaintiff left his work of repairing a car to assist two fellow laborers in fixing a "gun barrel drawbar," part of a Westinghouse friction gear. On striking the coupling or drawbar with a hammer, a spring was released which flew and struck plaintiff, injuring him severely. He did not know of the presence of springs in the drawbar and was not familiar with the construction of the coupling, but placed himself in front of the gun barrel and struck it. *Held*, that the Federal employers' liability act was controlling and that there was no liability if plaintiff assumed the risk of his injury, a defense open to defendant, as it was at common law, and that he must

RAILROADS—Continued.

prove actionable negligence on the part of his employer. 35 U. S. Stat. 65, U. S. Comp. Stat. 1913, §§ 8657-8665. *Gaines v. Railway Co.*, 398.

4. It was the intention of Congress to base the action upon negligence only and exclude responsibility of the carrier to its employees for defects and insufficiencies not attributable to negligence. *Id.* 399.
5. A master is not called upon to anticipate every possible accident, and may leave an employee to learn the hazards of the business as he learns the business itself, from his associates and experience, where the hazards are not extraordinary. *Id.*
6. Where the relationship of master and servant existed, and, though not directly ordered to do what he did, where he was acting in the line of his employment, which was the repair of cars, including drawbars, plaintiff could not be said to have acted as a mere volunteer, but, under the recognized rule that workmen engaged in repair work of defective or dangerous appliances, etc., assume the added risk incident to the existing condition of the instrumentality or place of work, he could not recover. *Id.*
7. One engaged in the repairing of defects assumes the risk of injury incident to their damaged condition, the risk being an ordinary one. *Id.*

See CARRIERS (4, 7-9); DAMAGES (2); FIRES (1); MASTER AND SERVANT (7, 17, 18).

RATIFICATION—See SALES (3).

REAL ESTATE SALE—See BROKERS (3).

REAL PROPERTY—See EQUITY (11); FRAUDS, STATUTE OF (1).

REASONABLE DOUBT—See PERJURY (5).

RECORD—See APPEAL AND ERROR (3, 8); LIMITATION OF ACTIONS (3).

RECORD OF PROCEEDINGS—See BANKRUPTCY (3).

REDEEMABLE INTEREST—See TAXATION (4).

REDEMPTION—See TAXATION (2, 3).

REGULATION—See TELEGRAPHS AND TELEPHONES (2).

REPEAL OF STATUTE—See INJUNCTION (2).

REPORT—See CRIMINAL LAW (23).

REPUDIATION—See MASTER AND SERVANT (3).

REQUESTS TO CHARGE—See DAMAGES (3); PERJURY (5).

RESCISSION—See SALES (6).

RESCISSION OF AGENT'S AUTHORITY—See SALES (2).

RES JUDICATA—See BANKRUPTCY (2, 4); EQUITY (9); ESTATES OF DECEDENTS.

RESTRAINING ACTION AT LAW—See INJUNCTION (1).

RESULTING TRUST—See TRUSTS (1).

REVIEW—See MASTER AND SERVANT (6); PLEADING (8).

REVIEW BY INDUSTRIAL ACCIDENT BOARD—See MASTER AND SERVANT (4).

REVIEW OF ASSESSMENT—See TAXATION (1).

REVOCATION—See WILLS (7, 8).

RIDING ON PLATFORM—See CARRIERS (16, 19).

RIGHT TO OPEN AND CLOSE—See TRIAL (11).

RIPARIAN RIGHTS—See WATERS AND WATERCOURSES (1).

SAFE PLACE—See MASTER AND SERVANT (7).

SALARY—See WORDS AND PHRASES.

SALES.

1. Where defendant, after the installation of a refrigerating machine guaranteed to have a certain capacity by the seller, gave to the engineer who put it in a statement that it conformed to specifications and was in operation, etc., the release did not bar a recovery for failure to conform to the warranty of capacity. *Brown v. Pendergast*, 313.
2. Evidence, in a suit for the amount paid upon a sale or subscription of corporate stock which was converted to the use of the defendant's agent, who solicited the subscription, defendant refusing to issue the stock or refund the payment, and claiming that before the stock was subscribed for it withdrew the same from the market, that the agent's authority terminated with the taking effect of the "blue sky law," and that the plaintiff was estopped by delay in presenting the certificate, *held*, to present an issue for the jury whether the letter terminating the agent's authority was ever delivered, and as to the estoppel charged. *De Hoop v. Insurance Co.*, 380.
3. The trial court did not err in declining to direct a verdict for the defendant on the ground that the so-called "blue sky law," Act No. 143, Pub. Acts 1913, required the agent to register, and he failed to comply with it, since he was a *de facto* agent and the sale was not unlawful as to a corporation which had accepted the benefits of the trans-

SALES—Continued.

action; especially in view of the cases holding the act of 1913 unconstitutional. *Id.* 381.

4. In an action on a promissory note, defendants claiming damages for breach of warranty of a stallion, which proved impotent, according to defendants' evidence, testimony on plaintiff's behalf that the horse was made weak by sickness and improper care, while in the hands of the defendants, raised an issue of fact that should not have been taken away from the jury. *McKinley v. Small*, 436.
5. Where there was evidence that the horse was defective when he was delivered, and not such an animal as the plaintiff had warranted, the defendants were entitled to have the question submitted to the jury under instructions that if the jury found that the horse was not sexually defective when he was delivered, and his failure to meet the terms of warranty was due to sickness and improper handling, plaintiff could recover on the notes. *Id.*
6. And when the defendants were not relying on a rescission, but on the contract of warranty, which required the vendor to replace the horse if he did not conform to the provisions of the warranty, the court was in error in holding that defendants could not defeat the plaintiff's action on the note for the reason that there had been no rescission and return of the stallion. *Id.* 437.

See HOMESTEADS (2); MUNICIPAL CORPORATIONS (2, 3).

SAVING QUESTIONS FOR REVIEW—See APPEAL AND ERROR (1, 3, 5).

SCHEDULES—See BANKRUPTCY (4).

SCHOOLS AND SCHOOL DISTRICTS—See CONSTITUTIONAL LAW (1, 3, 5).

SCOPE OF AUTHORITY—See AUTOMOBILES (1); MASTER AND SERVANT (26, 27).

SELF-SERVING EVIDENCE—See EVIDENCE (1).

SEPARATE CAUSE OF ACTION—See PLEADING (4).

SEPARATE MAINTENANCE—See DIVORCE (9).

SEPARATE TORTS—See PLEADING (6).

SET-OFF AND RECOUPMENT—See EVIDENCE (11); LIMITATION OF ACTIONS (2); TRIAL (11).

SIGNALS—See STREET RAILWAYS (9).

SIGNATURE OF WIFE—See HOMESTEADS (3).

SIMILAR INJURY—See EVIDENCE (10).

SPECIAL LEGISLATION—See CONSTITUTIONAL LAW (5).

SPECTATORS IN COURT ROOM—See CRIMINAL LAW (15).

STATE TAX COMMISSION—See TAXATION (1).

STATUTE OF FRAUDS—See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS—See LIMITATION OF ACTIONS.

STATUTES—See BROKERS (1); CONSTITUTIONAL LAW (1, 2); CRIMINAL LAW (1); DIVORCE (4); FRAUDULENT CONVEYANCES (4); INJUNCTION (2); MECHANIC'S LIENS; MUNICIPAL CORPORATIONS (3, 4); TELEGRAPHS AND TELEPHONES (3); TRESPASS (1); TRIAL (3).

STOCK AND STOCKHOLDERS—See FRAUDULENT CONVEYANCES (8, 9); SALES (2, 3).

STREET RAILWAYS.

1. Where the driver of an automobile testified that he started to cross defendant's street car track three or four hundred feet ahead of a street car, believing that he had ample time in which to cross, and the motorman disputed the statement, there was evidence to take the case to the jury, and the trial court properly declined to direct a verdict for claimed contributory negligence of the driver. *Travelers' Indemnity Co. v. Railway*, 375.
2. The chauffeur was entitled to assume that the motorman would observe reasonable vigilance according to conditions, and it was his duty to have the car under such control as to admit of stopping it as soon as he could discern objects on the track. *Id.*
3. Mutual care to avoid collisions is demanded and to be expected; and both parties on a busy street in a city were entitled to use their own method of travel and required to avoid accidents by the use of all reasonable precaution. *Id.*
4. A witness who had formerly been in defendant's employ as a conductor and run cars for nine or ten years, being familiar with the method of operating them and stopping cars under disadvantageous conditions, was qualified to express an opinion on the subject by hypothetical question and answer. *Id.* 376.
5. Plaintiff owned and controlled a franchise to operate electric cars on certain streets of defendant city, which refused to grant a petition for leave to build a passing track 300 feet long on West Huron street between State avenue and Franklin boulevard. In the franchise granted to plaintiff railway company it was authorized to lay single or double tracks on this and other streets with "all necessary and convenient tracks for turnouts, side tracks, switches," etc. The defendant opposed the location of the switch on the ground that its location would endanger the lives and limbs of school children, because it was purposed to construct the turnout immediately in front

STREET RAILWAYS—Continued.

of city school buildings: the municipal defendant further offered its consent to a location some distance away from the objectionable place. The jury were instructed that the question for them to determine was whether the inconvenience to the public existed as claimed, because it was dangerous to school children; and, if so, whether the benefits to the company outweighed by a preponderance of the evidence the dangers to school children and to travelers on the streets; that, in order to answer the question in the affirmative, they must find by a fair preponderance of the evidence that the benefits and additional use of the company are such reasonably necessary ones as fairly outweigh the dangers and inconveniences, if any, claimed by the city. *Held*, that the charge was not subject to criticism and it was a proper sequence of the preceding instructions to the jury. *Detroit United Railway v. City of Pontiac*, 466.

6. It was not harmful for the court to grant a request to charge of the plaintiff limited by the court's suggestion that if the jury could see that it was applicable they might use it, to the effect that the street cars of plaintiff had the same right to travel over the street as other vehicles. *Id.*
7. Nor did the court commit reversible error in advising the jury that the testimony given by employees of the railway company was not to be given more weight on the question of safety of the school children than the statements of any other witnesses. *Id.* 467.
8. *Held*, that the charge of the court was not so argumentative as to prejudice the rights of plaintiff, and, though open to some criticism, fairly presented the issue to the jury. *Id.*
9. Where plaintiff started to cross a wye of defendant's tracks to reach a car which he purposed to board, and was obliged to pass in the rear of a standing car that was about to back up to turn about on the intersection, and no warning or signal was sounded to indicate the intention to back, as required by an ordinance of the municipality, known to the plaintiff, and there was no conductor on the rear platform, as also required by ordinance, the trial court erred in directing a verdict for defendant on the ground that plaintiff did not look after he left the curb, in taking five or six steps and passing behind the standing car. He was entitled to assume that the servants of defendant would conform to the provisions of the ordinance and the standing car would not back up without a conductor at the rear to sound a warning or take necessary precautions. *McManigle v. Railway*, 530.
10. Where plaintiff fell into an excavation of the defendant railway, in the streets of the city of Detroit, and sustained severe injuries, the trial court did not commit error in

STREET RAILWAYS—Continued.

instructing the jury, in substance, that, if the rain and storms that might be expected at that time of the year put the street out of repair and rendered it dangerous, defendant would be chargeable with negligence, but, if they found that a storm of unusual severity, or one that might not be expected under ordinary circumstances and conditions, came up, then it would be something that human foresight could not prevent and would be an extraordinary visitation and the defendant would not be chargeable with negligence. *Norris v. Railway*, 578.

See **CARRIERS (14-18); DAMAGES (3).**

SUBMITTING CASE TO JURY—See MASTER AND SERVANT (14).

SUMMARY PROCEEDINGS—See FORCIBLE ENTRY AND DETAINER.

SUNDAY CONTRACT—See EVIDENCE (3).

SUPPLEMENTAL EVIDENCE—See MECHANIC'S LIENS (3).

SUPPORT—See NEGLIGENCE (6).

SYMPATHY—See TRIAL (10).

TAXATION.

1. Under the general tax law the State tax commissioners are given authority to inspect the tax rolls, after they have been passed on by the various reviewing boards, and, if the investigation warrants, may issue an order to the assessor whose rolls are under review to appear with his assessment rolls therefor, and the State board is authorized not only to inspect and investigate the rolls, but also to examine witnesses and documents. Sections 148-150. Neither the order by the commissioners nor the petition for mandamus is fatally defective for failure to make it apparent how it came to be shown that the assessment required an investigation or review. *Board of State Tax Com'rs v. Kohler*, 420.
2. The notice required by section 140 of the general tax law is intended by the statute to be given and signed by the owner of the tax title, who should state his post office address, so that the owner may be informed to whom he should pay the amount required for redemption, and where he can be reached by mail: signing by any one else than the owner is invalid. 3 Comp. Laws 1915, § 4138. *Wilson v. Sauble*, 443.
3. Where defendant purchased a tax title of the county treasurer for 1905, of which the redemption period had not expired, so that the demand to redeem from the tax was premature, nothing appearing on the notice, which required the owner to pay the tax of 1905, as well as other years named, to show whether the tax had been paid as a condition of purchase (in which case it would be rightly

TAXATION—Continued.

included), the notice was void because it named an excessive amount as a condition of redemption. *Id.*

4. Complainant, who bought the property of V., who had originally had a warranty deed made in 1904, and obtained a quitclaim to replace it five years later, after losing the original conveyance, had a redeemable interest. *Id.* 444.

See ADVERSE POSSESSION (2); CONSTITUTIONAL LAW (3).

TEACHERS' PENSIONS—See CONSTITUTIONAL LAW (1, 5).

TELEGRAPHS AND TELEPHONES.

1. Under the authority granted to the railroad commission by virtue of the terms of Act No. 206, Pub. Acts 1913, 2 Comp. Laws 1915, § 6689 *et seq.*, the power of the commission to require a physical connection extends only to two or more persons, copartnerships, or corporations operating telephone lines which can be made to form a continuous line of communication. It gives the power to order a physical connection whenever and wherever those lines by such connection can be made to form a continuous line of communication whether between the different towns or between subscribers in the same town. *Michigan State Telephone Co. v. Railroad Com'n*, 515.
2. The enforced physical connection between the lines of two companies would be an exercise of the right of regulation, and would not amount to such a taking as could only be justified by the power of eminent domain. *Id.* 516.
3. The relations of a telephone company in this State are not simply with its own subscribers, but with the public generally, and it is forbidden by law to make any discrimination between persons. 2 Comp. Laws 1915, § 6688. *Id.*
4. Since the regulation of public utilities by the State is thus, and necessarily, an interference to some extent with private property, it can be justified only by the demands of public convenience and necessity, and the regulation must be reasonable having in view the public interest to be subserved and the extent of the burden imposed. *Id.*
5. The statute does not require that the public necessity be peculiar to the particular case, for the existence of a public necessity in each particular case is not diminished by the existence of the same public necessity in all cases; and, under said Act No. 216, Pub. Acts 1913, 2 Comp. Laws 1915, §§ 6689-6714, the question whether public convenience and necessity require physical connection of competing telephone lines in a particular case is a question of fact in every instance, the result of competition varying in different localities. If there is a public need of the connection the statute is satisfied. *Id.*
6. *Held*, on an appeal from a decree for the defendant rail-

TELEGRAPHS AND TELEPHONES—Continued.

road commission, in a suit to test the validity of an order requiring the complainant and Citizens' Telephone Company to connect their systems for toll line service in Traverse City, that the needs of the locality justified an order of the commission to the effect aforesaid and that its fixing of charges was not an abuse of discretion. The burden was on complainant to show that the connection would inflict undue loss upon it and one that could not be avoided by adjustment of the rates, tolls and charges. *Id.*

See CARRIERS (9).

TENANTS AS PARTIES—See EJECTMENT (1).

THREATS—See DURESS (1, 4).

TIME—See DIVORCE (1).

TITLE—See DIVORCE (3); FALSE IMPRISONMENT.

TORT ACTION—See ACTION (2).

TORTS—See ADMIRALTY; DURESS (2).

TOTAL DISABILITY—See MASTER AND SERVANT (5).

TRANSFER ON BOOKS—See FRAUDULENT CONVEYANCES (8).

TREBLE DAMAGES—See TRESPASS.

TRESPASS.

1. No liability for treble damages arises under 3 Comp. Laws, §§ 11204, 11205, 3 Comp. Laws 1915, § 14632, if the trespass was casual and involuntary, or if the defendant had probable cause to believe that he owned the timber. *Held*, under the evidence, that the question was one for the jury. *Connor v. McRae*, 682.
2. And there were sufficient grounds for submitting separately two trespasses for cutting timber to the jury, to determine whether they were casual and involuntary so as to prevent liability for treble damages, where it was claimed one was where defendants had no timber and the other was in a section in which they owned a quarter section, and cut over the line. *Id.*

TRESPASS QUARE CLAUSUM—See APPEAL AND ERROR (9).

TRIAL.

1. A party to a cause, who offered a copy of a letter in which it was represented that some of defendants' notes were inclosed, might be cross-examined as to whether he actually did inclose them in the envelope. *Prussia v. Bailey*, 77.
2. In support of a claim of payment, defendant's wife was properly allowed to testify where the money used in pay-

TRIAL—Continued.

ment came from and to refresh her recollection by referring to a book of account. *Id.*

3. Where an action is brought against more than one defendant, and plaintiff does not care to dismiss as to any one of them, he need not do so, under Circuit Court Rule 43, § 3, yet, if there be no evidence as to any defendant joined in the action, the court may, and properly did, direct a verdict against plaintiff and in favor of the particular defendant, according to Act No. 182, Pub. Acts 1899, 3 Comp. Laws 1915, § 12628, relating to demurrers to the evidence. *Johnston v. Cornelius*, 115.
4. Where plaintiff on direct examination used a diary to refresh his recollection and was interrogated on cross-examination as to several entries not relating to the case, a ruling of the court stopping the further examination was in the discretion of the trial judge and would only be reversed if the court abused its discretion. *Coltin v. Kitzelberger*, 133.
5. Testimony, in a suit for broker's commissions, that in a conversation that related to the rental of a store which had been placed in plaintiff's hands to secure an occupier on commission, to the effect that he told the prospective tenant he could have the premises for a rental named, and that the latter was willing to pay the rental, was competent and not open to the objection that it was hearsay. *Id.* 134.
6. An order of the trial court, striking out improper remarks of one of the attorneys, and a direction, following the request of defendant's counsel to reprimand the attorney, to proceed with another question, was not reversible error or likely to be misunderstood by the jury. *Id.*
7. A question asked of a party whether he knew that plaintiff thought he had a certain agreement was not improper cross-examination. *Id.*
8. The objection that a subject had been already gone over was within the discretion of the court. *Id.*
9. Where the court at once advised the jury that alleged improper argument of counsel should not have been made, the error, if any, was cured. *Robbins v. Magoon & Kimball Co.*, 201.
10. It was not erroneous for the court below to charge the jury that the accident naturally appealed to the sympathy; that he would not ask them to cast it aside, but to govern it by their oaths, judgment, reason, and charge of the court. *Id.*
11. In a suit upon a promissory note, where defendant's counsel claimed a set-off, but neglected, by notice accompanying his plea, to waive the benefit of the general issue

TRIAL—Continued.

and admit the facts alleged in plaintiff's declaration, in compliance with Circuit Court Rule 24c, he was not entitled to open and close the case. *Kincade v. Peck*, 207.

12. Where defendant's counsel was absent from the courtroom when the court was ready to begin the trial, and, after a half hour's delay in an effort to locate counsel, a jury was called and plaintiffs permitted to make their *prima facie* case, after which court adjourned, counsel was not entitled, on the reconvening of court, to make a new beginning and examine the jurors, whether his default was intentional or unintentional. *Id.*

See AMENDMENTS; APPEAL AND ERROR (11); CRIMINAL LAW (9, 10, 14, 15); DAMAGES (3, 4); ELECTRICITY (4); EVIDENCE (4, 5, 12, 15); FIRES (2, 3); MASTER AND SERVANT (1, 2, 17); NEGLIGENCE (9); PERJURY (2, 3, 6, 7); PLEADING (9); SALES (5); STREET RAILWAYS (6, 7); TRESPASS.

TRUSTS.

Where defendant orally agreed with plaintiff and an associate to furnish the purchase price of certain real estate, taking title in defendant's name, and all three were to make an effort to sell at a profit, which was to be divided equally among them after allowing defendant \$200 for the use of his money, there was no resulting trust, and no other trust could exist without a written agreement. *White v. McKenzie*, 189.

See EQUITY (4-6, 8-10); FRAUDULENT CONVEYANCES (1).

UNDUE INFLUENCE—See WILLS (3-7).

UNIFORM TAXATION—See CONSTITUTIONAL LAW (3).

VARIANCE—See FIRES (5); PLEADING (9).

VENDOR AND PURCHASER.

1. The owners of Fox Creek subdivision in Detroit sold to a purchaser by land contract one lot, upon the restriction that buildings should face an avenue named, not nearer than 20 feet from the front line, and prohibiting open drainage; also, that no building should cost less than \$2,000. The assignee of the contract undertook to erect a structure of less than the value agreed upon, and complainants filed their bill to enjoin the breach of covenant. In part of the subdivision covered by the restrictions some building had been done of which only a small proportion complied with the covenants in the conveyances. This condition for the most part existed when the defendants purchased. *Held*, that the owners could make the restrictions a condition of any sale, and did not lose their rights because former buyers had violated the covenants. *Sherrard v. Murphy*, 352.

VENDOR AND PURCHASER—Continued.

2. As to a successor in title of the contract purchaser, the vendors were not estopped by any acts done before the contract was executed. *Id.*
3. The vendors, who still owned several lots, in the subdivision, could enjoin the erection of the building proposed by defendant, where the other purchasers had not substantially changed the character of the residence district and the prior violations were only temporary; the court finding that the restriction was still valuable to the grantors. *Id.*
4. An assignment of all the interest of one of several joint owners or vendees to another interested, reciting the existence of an indebtedness, and providing that the property be platted and sold at the best obtainable price, passed an equitable title to the real estate, and the assignor retained no interest under the land contract. *Detroit Cavalry v. Ranney*, 472.
5. It was, however, an untenable objection that complainant did not come into court with clean hands, because it had violated certain building restrictions on neighboring lots, which were subject in the contract only to the limitation that no building should be erected thereon nearer than 20 feet from the street line, and which did not appear to have been violated. *Id.*
6. A description of a block of store buildings in a written contract, or option, as the "Eagle Block" carried with it the buildings and rights of support of the adjoining block, in the form of a party wall, existing as such when the owner granted the option. *Weadock v. Champe*, 553.
7. Acceptance of the terms of the option required an unconditioned assent to its terms, and a letter suggesting a change in the description, and enclosing a deed describing the property by dimensions, etc., so as to extend beyond the center line of the wall, and not including a party wall agreement proposed by the defendant, was a counter proposition and did not create a contract, where the deed included about seven inches of the adjoining store block, instead of establishing the dividing line in the center of the party wall. *Id.*
8. *Held*, also, that by providing in the acceptance that the conveyance should be subject to all existing party wall agreements of record in the registry office on the date thereof, the vendee in the option excluded certain existing party wall rights that were not of record and that defendant was relieved from the effect of an acceptance and was justified in refusing the counter proposal. *Id.*
9. Where plaintiff, after securing the option, examined the leases existing upon the property, and, having retained them for some time, expressed himself as satisfied, a deed, executed by defendant subject to the outstanding

VENDOR AND PURCHASER—Continued.

leases, was not objectionable, though the leases were not recorded, in the office of register of deeds. *Id.* 554.

See FRAUDULENT CONVEYANCES (3).

VICIOUS MULE—See EVIDENCE (9).

VOLUNTEER—See RAILROADS (6).

WAIVER—See CRIMINAL LAW (17).

WARNING AND INSTRUCTING SERVANT—See RAILROADS (5).

WARRANT—See PERJURY (1).

WARRANTY—See SALES (1).

WATER RIGHTS—See WATERS AND WATERCOURSES (1).

WATERS AND WATERCOURSES.

1. In a chancery proceeding to compel a mill company to maintain a low water level, where other proprietors of riparian rights interested in the water level being maintained at a lower point were not parties, the court could not by its decree foreclose their rights. *Thompson v. Flouring Mill Co.*, 6.
2. *Held*, on review of all the evidence in said cause, that a decree which established defendant's prescriptive right to raise the waters of the lake above a fixed point on the sill of the flume was not justified, and complainants' bill should be dismissed. *Id.*
3. In an injunction suit to prohibit defendant from overflowing lands of the complainant, testimony that plaintiff paid \$5,000 for the mill and premises including a claim for damages against the defendant power company would not be proof of the value of the premises when the transfer occurred. *Morrison v. Light & Power Co.*, 604.
4. The property owner whose lands are damaged by flowing is under the legal obligation to minimize the damage as far as may be and in an action for the injury can recover only the damages that could not be avoided by exercising reasonable precaution. *Id.*
5. Where defendant power company flooded the mill property of plaintiff, he was entitled to adequate damages for the injuries sustained and it was not material whether defendant actually contemplated them, as it must be held that all damages naturally and proximately following from its wrong were in the contemplation of the tortfeasor. *Id.*
6. Award of damages of \$235 increased by the court to \$500 and decree modified accordingly. *Id.*

WEIGHT OF EVIDENCE—See STREET RAILWAYS (7).

WILLS.

1. Generally, under the statutes, a contest of a will can be brought only by a person interested at the time the will was admitted to probate, such persons including not only those named as beneficiaries in the will, but those who would share in the estate in case of intestacy, such as the heir or next of kin and those interested under a prior will. *In re Wynn's Estate*, 223.
2. Evidence that contestant was not a relative of decedent, but was taken when two years of age by testatrix and cared for and maintained until 17, when she married and left home, that there was a kindly feeling between them and that deceased had stated the contestant should have all her property, and she had given it all to her, etc., that a previous will had been drafted and either the contestant or her husband had been named as beneficiary, *held*, insufficient to establish any right to maintain a contest, though the contestant would have such right if she could show she was a legatee under a pre-existing will. *Id.* 224.
3. Also, *held*, that the evidence which tended to show mental weakness, forgetfulness, and other incidents of old age was insufficient to prove mental incompetency, and that the proofs of undue influence were insufficient to warrant the court in submitting the case to the jury. *Id.*
4. In a proceeding for the probate of a will, opposed by nephews and nieces of the testatrix, who devised the greater part of her estate to charitable institutions of the Catholic church, evidence reviewed, and *held*, insufficient to present a question of fact on the issue of undue influence by her religious advisers. *In re McIntyre's Estate*, 257.
5. Undue influence, to vitiate a will, should be more than influence, and must coerce the testator against her will, causing her action to be under compulsion or restraint such as to affect or destroy her free agency. *Id.*
6. It need not be proved by direct evidence, but can be established by indirect proofs or circumstantial evidence from which it may be inferred that such influence was exerted. *Id.*
7. Where the court in a will contest charged the jury that if decedent did not voluntarily destroy the instrument, or if they were not satisfied he actually destroyed it, or if he did it upon a surrender of his own judgment and an abdication of his judgment to the people with whom he boarded, the instrument should be sustained, and on an examination of the evidence upon error the court found that there was no competent proof of the contention that contestant had unduly influenced him, *held*, that the instruction was erroneous, and the error was not cured by the subsequent instruction that there was no evidence of undue influence, which was clearly in conflict with the

WILLS—Continued.

preceding instruction, and it would be assumed that if conflicting instructions were given the jury they might have followed the improper one. *In re Foerster's Estate*, 440.

8. *Held*, that in a previous opinion the legal phases of the case were fully considered by the Supreme Court and the law determined which should control the case, and the question of revocation was a question of fact, that the verdict was against the great weight of the evidence and a similar conclusion should be reached on the subsequent appeal. *In re Foerster's Estate*, 177 Mich. 574 (143 N. W. 616). *Id.*

WIRING—See ELECTRICITY (2, 3); EVIDENCE (4).

WITNESSES—See CARRIERS (13); CRIMINAL LAW (6, 13); EVIDENCE (4); NEW TRIAL (3); STREET RAILWAYS (4, 7); TRIAL (1, 4, 8).

WITNESSES, ABSENCE OF—See ADJOURNMENT.

WITNESSES, BIAS OF—See CARRIERS (8).

WORDS AND PHRASES.

A salary is defined as a periodical allowance made as compensation to a person for his official or professional services or for his regular work. *People v. Lay*, 477.

See DURESS (3); MASTER AND SERVANT (18).

WORKMEN'S COMPENSATION ACT—See MASTER AND SERVANT (3-5, 8, 9, 11, 13, 28).

WRITTEN CONTRACT—See FRAUDS, STATUTE OF.

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